REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Supreme Court

OF THE

STATE OF LOUISIANA.

SUPREME COURT——WESTERN DISTRICT,
OPELOUSAS, ... SEPTEMBER, 1831.

LABBE'S HEIRS vs ABAT EL AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SIXTH PRESIDING.

The *construction* and *effect* of an act of voluntary separation, and of a division of property between husband and wife, made in 1805, before the adoption of either of the civil codes, must be determined by the laws of Spain.

According to these laws the husband and wife were considered so far separate persons, that they could validly enter into any onorous contract—a *sale* being the example given to illustrate this doctrine.

The husband and wife were prohibited from making donations to each other during marriage, of property actually in possession; but the wife might renounce her right to the acquets at any time *before, during* and *after* the dissolution of the marriage.

A contract in which husband and wife mutually agree to separate, divide, and each take a specific portion of the community property, and renounce all right and claim to the community of acquets and gains, partakes strongly of the nature of a contract of *exchange*, by which each of the parties gives up all claim to the *whole*, in consideration of obtaining a distinct right and title to *a part* of the matrimonial community property.

Such a separation and division was strictly speaking a partition of common property, and cannot be assimilated to a donation.

The contract of exchange, in 1805, between the husband and wife operated as a good and valid separation of goods between the contracting parties,

Western District, *September* 1831.

LABBE'S HEIRS *vs.* ABAT ET AL.

and a dissolution of the community previously existing between them, and a renunciation of the acquets and gains subsequently acquired.

The voluntary separation of husband and wife, did not produce a legal separation *a mensa et thoro*. The husband would still be bound to provide for her maintainance.

The circumstance of the husband having an adulterous intercourse with his *mulatto slave* in the common dwelling, may have *induced* the wife, the more willingly to *abandon his bed;* but is not such an act of legal constraint and coercion on her, or of immorality in him, as to render the contract of exchange, and dissolution of the community of property, *null* and *void.*

If the wife makes a concealed donation by acknowledging subsequently to the marriage, that her husband brought in twenty-five hundred dollars when in fact it was owned by her at the time, such donation by the Spanish laws is only revocable during the life time of the *doner*, and at her instance,

In April 1826, Margaret Decoux, wife of J. B. Bernard Hiliare Decoux, and Julia Decoux, widow of Louis Pellerin, deceased, legal heirs and representatives of Charlotte Julia Labbé, deceased, filed their petition in the district court for the Parish of St. Martin, against Jean Pierre Descuirs, the husband of C. J. Labbe, by a second marriage, on her part, claiming of the defendant sundry paraphernal property, alleged to have been brought into the marriage by their deceased mother with said Descuirs; and one half of the community which is alleged to have existed between them until dissolved by the death of the wife in 1825.

A marriage contract was entered into between C. J. Labbé, (then widow Decoux) and J. P. Descuirs, stipulating that the wife brought $1095 37 worth of property into marriage; the husband's to be ascertained by inventory after marriage, and stipulating that a community of property should subsist between the spouses. They were then married, October 31st, 1781. The parties lived together until May, 1805, when they entered into a voluntary agreement to separate, and to live separate both in person and property. The act of voluntary separation was drawn up and signed, May 21st, 1805, and acknowledged before Henry Hopkins, commandant of Attakapas, the 25th of the same month.

The parties lived and administered each one's property separately, from that period until the death of the wife in 1825. The plaintiffs had an inventory of all Descuirs' estate taken, after the death of the wife, and allege that the community of property never ceased to exist between husband and wife, notwithstanding they lived separate, and had divided their property at the separation.

In December, 1826, Descuirs died, which was suggested to the court in April, 1827. The suit was revived against his heirs. They all renounced, or let judgment go by default, except *two sets;* viz. the representatives of *Magdelione Descuirs,* late wife of Barré, and of *Lucelle Descuirs,* late wife of A. Boutté, deceased; both collateral heirs of J. P. Descuirs, the late defendant. These two sets of heirs put in answers claiming half the community, if it should be decided to have existed, and reserving all their other rights until a final decision of this suit. At the death of Descuirs one Antoine Abat, a money-broker of New-Orleans, set up a claim to his whole succession, by virtue of an authentic act of sale, passed before P. Pedesclaux, notary public for the parish of Orleans, dated May 19th, 1821. Abat came and took possession of the estate, and was proceeding to dispose of it at public sale, when he was stopped by an injunction, obtained by the plaintiffs, restraining him from any further proceedings, alleging the sale from Descuirs to him to be *simulated* and *fraudulent.*

The injunction case was consolidated with the original suit.

In April, 1929, the plaintiffs were ordered to amend their original petition, and set forth their demand, cause of action, and property claimed, *explicitly.* They did so, and conclude by praying for the restitution of all the wife's paraphernal or dotal property, for half the community alleged to exist in relation to Descuirs' estate, and for the crops made since the death of their ancestor, and for a final partition and settlement with Descuirs' succession. They also pray that the sale from Descuirs to Abat may be declared to be simu-

Western District, *September* 1831.

LABBE'S HEIRS *vs.* ABAT ET AL.

lated, and in fraud of their rights, and accordingly annulled and set aside.

The sale to Abat is alleged to be *fraudulent* and *simulated:*

1st. Because no valuable consideration was given:

2d. Because, if such sale was made for nearly the whole of Descuir's succession, it is simulated and fraudulent, being made with a view to defraud the petitioners of their just rights:

3d. That the property intended to be conveyed, never ceased to belong to Descuirs, and was attempted to be transferred through Abat, for the benefit of a person incapable of receiving a legacy:

4th. That if ever Abat advanced money to Descuirs, he has been abundantly remunerated from the crops he has appropriated to his own use, raised from the plantation since the death of Descuirs:

5th. That as most of the property belonged to the petitioners' mother, it could not be alienated by Derciurs without a valuable consideration.

On the 4th of October, 1829, Abat, by his counsel, D. Seghars, filed exceptions to the petition, and an answer to the merits.

He excepted to the petition—1. That this is an action of partition of a pretended community with which he has nothing to do.

2. Because it purports to be an action of revendication of sundry slaves, without alleging the title by which they are held:

3. Because it purports to be an hypothecary action for the exercise of a right the petitioner's ancestor had to some property, which they allege to have been sold by the husband, and do not state the amount, or specify the property against which this action is to be exercised:

4. Because at the same time it purports to be an action of simulation, directly against this respondent:

5. Because he denies the plaintiff's right to cumulate all those distinct actions, and by making him a party to them, and subjecting him in case of success in either, to costs of suits in which he has no interest.

Answering to the merits, he pleads a general denial: And further answering, sets up an act of sale, from Descuirs to him of his lands and twenty-two slaves, &c. *for a valuable consideration.* He avers he has been in peaceable possession of all this property from the passing of the sale, May 19th, 1821, until arrested by the injunction of the plaintiffs. He denies that any community of property existed between J. P. Descuirs and his late wife, since their voluntary separation in 1805, that Descuirs had a perfect right to sell his estate, and that he was in full possession and has sustained damages to amount of five thousand dollars, by the injunction of plaintiffs.

On the trial, documentary and parol evidence was produced, directed mainly to two points.

1. As to the validity and effect of the voluntary separation of Descuirs and wife in 1805.

2. The validity of the sale of his plantation, slaves, &c. from J. P. Descuirs, to Autoine Abat, in May, 1821.

In regard to the separation, it was proved by the plaintiffs—that ever since their separation in 1805, they continued to live and administer their property separately. Madame Descuirs manifested no desire to return and live with her husband. She said she separated from her husband because he lived with his domestic Josephine, and had more regard for the mulatress than for her: That she never pretended to have any reclamations against her husband since the separation. Josephine and Descuirs continued to live together, and she had a son by him, called Charles. Descuirs acknowledged this child to be his son, and the latter called him father. He also boasted that Charles would figure in the society of Paris, to which he sent him to be educated.

On the part of the defendant it was shown, that Descuirs

Western District, *September* 1831.

LABBE'S HEIRS *vs.* ABAT ET AL.

and his wife both avowed always after the separation that they were separated in property; and lived and transacted their own business. Madame Descuirs lived on a separate plantation, and bought and sold her negroes and transacted all her own affairs. She ever spoke of her husband afterwards with the greatest *indifference*. She contracted all debts in her own name with the merchants of St. Martinsville.

2d. The sale to Abat.—Plaintiffs proved that Descuirs always lived, from the time of separation from his wife up to his departure for France in 1825, on the same plantation, working the same slaves, and possessing the same stock and farming utensils which were claimed by Abat in virtue of the sale to him in 1821; that Descuirs shipped and received the proceeds of the crops, and paid physicians' bills and other expenses of the farm. Descuirs was a prudent, economical man, who never contracted large debts, nor lived extravagantly. He was not embarrassed. His plantation and all the stock and other utensils, claimed by Abat, were inventoried by the parish judge in 1825, in his (Descuirs') own name. The parish judge had several conversations with him after the pretended sale to Abat in 1821—one soon after his return from New-Orleans, in which he said: *"Qu'il avait vendu sans avoir vendu; et qu'il pourrait ravoir son habitation quand il le voudrait."* One witness dined with Descuirs in 1823 or 1824, who joked him about making him his heir, in order to disinherit his nephews.

Josephine continued to live with Descuirs on the plantation until his departure for France, when he took her with him. She returned from France to New-Orleans with him. In conversation, he induced several persons to believe he intended to leave all his property to Josephine and Charles her son; and that he employed Porter and Brent to write his testament, *willing* his estate to Josephine and Charles. Josephine, since his death, continues to live in a fine house in New-Orleans, which is also well furnished. Abat never

appeared on the plantation, or to exercise any acts of ownership over it, until after Descuirs departed for France. He said, before leaving it, he had rather die on his way to France than live here. His conduct on starting induced the belief he intended to convey away his property.

On the part of the defendant Abat, witnesses said that, in 1825, after Descuirs started for France, Abat took possession of the plantation, hands, and stock, &c. and put an overseer on it. He received the crops. In 1827, after Descuirs' return to New-Orleans, and death, Abat then offered the plantation, negroes, and all the stock, &c. at public sale; and was proceeding to sell it, until stopped by the plaintiffs injunction;—that Descuirs sold all his household furniture and horses before he set out for France. One witness says he saw Descuirs in New-Orleans at the time he sold his plantation to Abat. He told witness he had sold it, and intended to go to France, but he had agreed to go and live on the farm, to save Abat the expense of hiring an overseer, and to sell some moveables, &c. Witness *heard* that Descuirs took $25,000 or $28,000 with him to France, and invested it in property; that he heard he had purchased to the amount of 120,000f. and again sold it for 96,000f.: *all hearsay.* A clerk in the notary's office says, when Descuirs passed the sale of his plantation and slaves to Abat, the notary counted the money for the price, and paid it over to Descuirs, who took it off with him; the sum appeared not less than twenty, nor more than thirty thousand dollars: it was in bank notes. Witness don't know who brought the money to the office: thinks it was not Abat.

There was judgment for the plaintiffs in the court below, and the defendant appealed.

Simon, for plaintiffs, made the following points:

1st. That the act under private signature, made the 21st May, 1805, contains a stipulation of *separation* of property, and of *dissolution of the community;* that it was done amicably and by mutual consent of the parties.

Western District, *September* 1831.

LABBE'S HEIRS *vs.* ABAT ET AL.

2d. A voluntary separation of husband and wife, was not permitted by the Spanish laws; and such separation did not put an end to the community of property.—*Feb.* part 2, book 1, ch. 4, nos. 51 and 52. *Ibid*, ch. 4, nos. 1, 2, 46 and 50.

3d. The same rule of law prevailed in France. A separation of husband and wife could not be even submitted to arbitrators, either in Spain or France.—*Poth. Com.* Vol. 2, § 542, 492. *Ibid, Traite des Droites desepoux pour Daubauton*, pp. 73, 164. *Par.* 4, title 10, law 8. *Poth. Com. du Mar.* vol. 2, p. 87, § 517 and 518. *Leyislation Judiciare*, p. 371, *Actes de Notorieté du chatelet de Paris*, p. 178

4th. A judicial sentence is necessary to destroy the community of property, after it once exists.—7th *Mar.* N. S. 50

5th. The renunciation of the community is the *consequence*, and not the *object*, of the act of separation of 1805. Before renouncing, the community must be dissolved and open. This right of renunciation is given to the wife, *for her benefit*, and for the purpose of avoiding the payment of debts contracted during marriage by the husband. There was no such object in view by the wife, in the act of separation in 1805.—*Gomez ad leges Touro*, 633 and 631, and authorities cited by defendants counsel on the 60th law of Toro. *Poth. Com.* vol. 2, § 542.

6th. The Spanish laws, in giving to the wife the right of renouncing to the community, in order to avoid the payment of the debts of the community, (which renunciation, it is contended, is the *consequence*, and not the *dissolution* itself,) have pointed out certain formalities which, being fulfilled, make the renunciation binding on the wife; but which have not been observed in this case.—*Feb.* part 2, book 1, ch. 4, nos. 58 and 60. *Ibid*, part 1, ch. 5, nos. 9 and 10. *Ibid*, part 1, ch. 5, § no. 43.

7th. All the authorities cited by the adverse counsel go to shew that, under the Spanish laws, all donations between husband and wife are prohibited, and, consequently, the acts containing such donations are *null and void*. This is admit-

ted; and it seems that the act of 1805 contains *an indirect donation* from the wife to her husband, not only by diminishing the amount of her rights, but also by acknowledging his having brought in marriage $2500, which is proven by *nothing* but this *acknowledgment.*

8th. The sale made by Descuirs to Abat was made in fraud of the wife, and is fraudulent and simulated, being in prejudice of her *rights* and those of the *forced* heirs, it ought to be annulled and set aside.—*Recop.* title 4, book 10, law 5.

9th. Simulation may be proved by presumptions. The evidence in this case clearly proves fraud and simulation from the presumptions arising from the mass of facts proven.—*Syrey*, vol. 2, 16. 3d *Martin*, N. S.

10th. The evidence in the cause shews, that the motives and causes of the act of separation of May 21, 1805, were immoral; because the husband lived in open *concubinage* with the *mulatresse* Josephine. On this ground the act ought to be annulled and set aside.

Bowen, on same side, contended:

1st. That the motives which led to the act of separation of 1805, between the husband and wife, were so *immoral* that it completely vitiates it; that no acts of the wife, under such circumstances, could have any binding effect; she was *constrained* by the husband's bad and *immoral* conduct to consent to the execution of the act, and no law would require its enforcement in a court of justice.

2d. That the sale from Descuirs to Abat of his estate, is *fraudulent* and *simulated*, as is abundantly proved. Such being the case, it must be annulled and set aside, as far as it relates to the rights and interests of the plaintiffs.

Seghers, for defendant, urged the following points, and *errors* in the judgment of the district court.

1st. The judge *a quo* erred in deciding that, by the act of May, 1805, and of the separation of the parties, the wife had renounced the *gananciales*, and that this renunciation is not

Western District, *September* 1831.

LABBE'S HEIRS vs. ABAT ET AL.

binding on her, because she has not *expressly* and solemnly, before a notary, renounced all the laws specially in her favour.—*Febrero*, part 2, vol. 1, p. 227, nos. 57, 58, 59, 60, *ibid*, part 1, vol. 2, p. 72, no, 117, and p. 159. Note 44 on no. 117. *Ibid*, part 1, vol. 3, p. 440, no. 21. *Gomez ad leg. Tauri*, pp. 633, 634. *Maticuro*, folio 271, verbo gloss. 1, no. 2, on law 9, title 9, book 5 of *Recopilacion*. No. 9 of same gloss. *Azevedo*, vol. 2, pp. 311, 312, gloss. 1, 2, 3, 4; or the same law of the *Recopilacion*; and which is also the law 60 of Toro. *Nueva Recop.* book 5, title 16, law 2.—*Azevedo*, vol. 2, p. 418. *Matienzo*, p. 419, *recto*. *Moreau's Partidas*, vol. 2, p. 1246, rule 27. *Novissima Recop.* book 3, title 2, laws 3 and 5. 3d *Martin*, N. S. 607. 2d *Martin*, N. S. 672. 1st *Martin*, 259.

2d. The judge *a quo* erred in deciding that the plaintiffs were entitled to recover one-half of the estate of Jean Pierre Descuirs, which he has conveyed to the defendant, on the ground that a community of property continued to exist, after the separation between Descuirs and his wife; and that the said alienation to defendant was fraudulent and simulated, and should be annulled and set aside.—*Febrero*, part 1, vol. 2, ch. 10, no. 10, p. 364. *Gomez, variæ resol.* vol. 2, p. 434, no. 3. *Nov. Recop.* book 10, title 4, law 5. *Ibid*, book 3, title 2, laws 3 and 3.

3d. The judge *a quo* erred, in not dissolving the injunction sued out by the plaintiffs against the intended sale of the property by Abat, and in not awarding to him the damages he has suffered in consequence of that injunction.

Mazureau on the same side.

**Mathews, J.* delivered the opinion of the court.

The plaintiffs in this case claim from the defendants an account of the estate of their deceased mother, which, they allege, was held in community with him; and pray a decision

**Porter, J.* took no part in the decision of this case, being out of the state, under leave of absence, when it was argued.

in their favour for whatever amount may be found to have been the property of the deceased. Before judgment could be rendered, the defendant Descuirs died; and the suit was prosecuted against his heirs, of whom a great number were cited; and many of them formally renounced the inheritance. During the progress of the cause in the court below, the plaintiffs brought suit against a certain Antoine Abat, to cause a conveyance made to him by Descuirs, during his life-time, of all the property of the latter, to be annulled, on the grounds of simulation and fraud. These suits were consolidated, and proceedings took place on them, in virtue of which judgment was rendered in favour of plaintiffs, from which the defendant Abat appealed.

The principal facts of the case, as they appear by the documents and testimony, are as follows: In the year 1781 the mother of the plaintiffs (then the widow of Jos. Decoux) and Jean Pierre Descuirs entered into a marriage contract, by which they formed a community of property. The part of this community which was to be brought in by the husband, was not specified at the time, but was, by agreement, to be ascertained at some future period. That brought by the wife was estimated at $1095 37. Their marriage was celebrated in pursuance of this contract. They lived together under the matrimonial union, holding their property in community, the wife having a right to one-half of the acquets and gains, until 1805. On the 21st of May, in that year, they entered into a contract, by which both parties agreed to a separation of property, and a dissolution of the community, in presence of several of their neighbours, called in to assist them in the division of the estate—which was divided, both as to the *biens propres* and the *gananciales*, up to that period, each party taking separate possession of the property assigned to them under this division. They continued in this state of separation until the death of the wife, each party having the use and enjoyment of the portion assigned to them, separately. The motives for this sepa-

Western District, *September* 1831.

LABBE'S HEIRS *vs.* ABAT ET AL.

ration are not made known in the contract; it is simply stated, that it was done by mutual consent. There is, however, a probability raised by the testimony of some of the witnesses, that the wife acquiesced in this measure the more readily, in consequence of a supposed criminal intercourse between her husband and a young mulatto slave, belonging to the household: for, after the separation of property and dissolution of the community, the spouses lived no longer together. There is no evidence of any personal abuse, or ill-treatment exercised by the husband towards his wife, or that he drove her by force from his bed and board. At the time of the dissolution of the community, the property which each of the parties brought into it, originally amounted, by estimation, to $25,000; and on this basis the whole, both capital and profits, was equally divided. Abat, the appellant, produced in evidence an authentic act, clothed with all the formalities of law, by which it appears that Descuirs' sold to him all his estate, &c. The act of separation, &c. which was made in private form, was acknowledged by the parties before a person exercising the functions of judge and notary, immediately after the occupation of Louisiana by the United States, was recorded, and a copy is taken from the archives of the parish of St. Martin.

On these facts several questions of law are raised:

1st. Whether the act of separation of goods, and dissolution of the community, is valid and binding on the parties, in any respect, according to the laws in force in this country, at the time of its execution?

2d. If good as to the *gananciales*, whether it is not void as to the $25,000 acknowledged to have been brought into the community by the husband, on the ground of this part of the stipulations in said act being a disguised donation to the husband by the wife, not tolerated by law?

The *construction* and *effect* of an act of voluntary separation, and of a division of property between husband and wife, made in 1805, before the

A *third* question relates to the truth and genuineness of the deed of sale from Descuirs to Abat.

For a solution of the first two of these questions we must

resort to the Spanish laws, which afford the only *legitimate* rules by which the acts of the parties are to be construed. According to these laws it is clear that husband and wife were considered so far separate persons; that they could validly enter into any onerous contracts between themselves. A sale is the example given to illustrate this doctrine. They seem to have been prohibited only from making donations to each other, during the marriage, of property actually in possession. By the same laws the wife was permitted to renounce her rights to the matrimonial acqets and gains, at any time before, during, or after the dissolution of the marriage. These rights and disabilities are fully established by *Gomez ad leges Tauris*, and in his treatise entitled *Barœ Resolutiones*, by *Febrero*, *Maliengo*, and other authorities.—See *Gomez en leges Taure*, 633 and 634. *Varce Resolutione*, p. 434. *Maliengo*, folio 271. *Verzo*, no. 2. *Febrero*, part 1, ch. 10, § 1, no. 2; and part 2, book 1, ch. 4, § 2, no. 57, 58, 59 and 60.

The contract by which Descuirs and his wife agreed, in 1805, to a separation of property, and dissolution of the matrimonial community which had previously existed between them, may be considered as partaking strongly of a contract of exchange, by which each one of the parties gave up his common right or claim to all the property, in consideration of his having obtained a separate and distinct title to a part. It was, strictly speaking, a partition of common property, and cannot be assimilated to a donation. It is well known that contracts of exchange, and agreements to divide a common property, create many obligations between the parties to such contracts very similar to those which arise out of the contract of sale. We, therefore, conclude that the contract of 1805 did operate a good and valid separation of goods between the contracting parties, and dissolution of the community which previously subsisted between them, and a consequent mutual renunciation of any community of acquets and gains which may have been acquired, subsequent to that

adoption of either of the civil codes, must be determined by the laws of Spain.

According to these laws the husband and wife were considered so far separate persons, that they could validly enter into any onorous contract—a *sale* being the example given to illustrate this doctrine.

The husband and wife were prohibited from making donations to each other during marriage, of property actually in possession; but the wife might renounce her right to the acquets at any time *before*, *during* and *after* the dissolution of the marriage.

A contract in which husband and wife mutually agree to separate, divide, and each take a specific portion of the community property, and renounce all right and claim to the community of acquets and gains, partakes strongly of the nature of a contract of *exchange*, by which each of the parties gives up all claim to the *whole*, in consideration of obtaining a distinct

Western District, *September* 1831.

LABBE'S HEIRS *vs.* ABAT ET AL.

period, by the parties to the contract. It cannot be considered as having produced a legal separation, *a mensa et thoro.* The husband would probably have been obliged to provide for the maintenance of his wife, or to have afforded her bed and board, had she required it at his hands. It is true, the testimony shews, that after the execution of this contract, a voluntary separation of persons took place between the parties; but we have no evidence of any violence, or actual constraint exercised by the husband or his wife. The suspicion of an adulterous intercourse between him and his mulatto slave, may have had its effect on his wife to induce her the more willingly to abandon his bed. But, perhaps, this contract would not have afforded a legal ground for a separation, as the municipal laws of Spain and, probably, of most other countries, are much more indulgent to acts of incontinency done by husbands, than offences of this kind committed by wives. The reason given by legislators for this distinction, is, that in the one case there's danger of a spurious offspring, which does not exist in the other. This is true. And it is perhaps equally evident, from the different degrees of rigour applied by law to the same moral offence in the different sexes, that men, and not women, have, in all ages, been the makers of laws. Be this as it may, we are of opinion that the conduct of the husband, in the present instance, did not amount to a legal constraint or coercion of his wife, in such a degree as to authorize a court of justice to declare the contract null. Having been made by parties capable of contracting, and by mutual consent, it should be held as valid *in toto*, unless some of its provisions contain stipulations reprobated by law. From these observations, applicable to the entire agreement, we come to consider that part of it which is alleged to cover a donation from the wife to the husband.

In relation to this question we may be very brief: for, admitting that a concealed donation was made of the $2500, acknowledged to have been brought into the community by

right and title to *a part* of the matrimonial community property.

Such a separation and division was strictly speaking a partition of common property, and cannot be assimilated to a donation.

The contract of exchange, in 1805, between the husband and wife operated as a good and valid separation of goods between the contracting parties and a dissolution of the community previously existing between them, and a renunciation of the acquets and gains subsequently acquired.

The voluntary separation of husband and wife, did not produce a legal separation *a mensa et thoro*. The husband would still be bound to provide for her maintainance.

The circumstance of the husband having an adulterous intercourse with his *mulatto slave* in the common dwelling, may have *induced* the wife, the more willingly to *abandon his bed;* but is not such an act of legal constraint and coercion on her, or of immortality in him, as to render

the husband, being unsupported by any other evidence except this acknowledgment, it was revocable by the laws then in force, only, during the life-time of the donor, and at her instance; in other words, it became valid by her death.—*Gomez in leges Tauri*, laws 50, 51, 52 and 53, no. 65.

With regard to this contract not having been sanctioned by the oath of the wife, we are of opinion that this omission does not, in any manner, impair its legal validity. If its stipulations are directly contrary to law, then such an oath could not give them validity *in foro legis;* and if they are in accordance with law, they require not the sanction of an oath to make them valid and binding on the parties.—See 11 *Mar.* 529.

Being of opinion that the plaintiffs have not shewn a right to any part of the succession of J. P. Descuirs, and as the contest between them and Abat depends solely on the recognition of such right in them, it is deemed unnecessary to examine the third question proposed, which relates to the sale from Descuirs to him.

It is therefore ordered, that the judgment of the district court be avoided, reversed, and annulled. And it is further ordered, adjudged, and decreed, that judgment be here entered for the defendants in both those cases as consolidated, with costs in both courts; reserving to the heirs of J. P. Descuirs their rights (if any they have) to pursue Abat, to obtain a recision of the sale made to him by their ancestor.

the contract of exchange, and dissolution of the community of property, *null* and *void*.

If the wife makes a concealed donation by acknowledging subsequently to the marriage, that her husband brought in twenty-five hundred dollars when in fact it was owned by her at the time, such donation by the Spanish laws is only revocable during the life time of the *donor*, and at her instance.

BOREL vs. FUSILLIER.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

When a stipulation is made, prolonging payment, on *condition* that the debtor pays interest *annually;* the latter must shew a *performance of the condition* on his part, to entitle him to *its* benefit.

If the defendant relies on the performance of certain conditions which entitle him to an extension of credit, he must shew by proof, a *performance*—the plaintiff is not required to shew a non-performance.

Western District, *September* 1831.

BOREL *vs.* FUSILLIER

The allegation that interest was not paid is a *negative assertion*, which according to the rules of evidence, throws the proof on the adversary.

On the 28th of February, 1828, Magdelaine Borel, sold to the defendant, F. Fusillier, several slaves for 3,500 dollars. The act of sale contained the following clause, upon which this case turns:—"and the balance (thirty-one hundred dollars) to be paid by the said Fusillier, in three equal annual instalments, from and after the date hereof; and each instalment if not paid when due, with 8 per cent per annum interest from *that* time until paid; *and it is further agreed, &c. that the said F. Fusillier is not to be compelled to pay any of the said instalments until two years after the last one becomes due, by paying interest at the rate of* 8 *per cent per annum on each instalment* ANNUALLY, *after they respectively become due.*" This suit was brought to recover the last instalment, which became due the 28th February, 1831. The defendant denied that it had become *due* and *payable* according to the stipulations in the act of sale. The plaintiff had judgment and the defendant appealed.

Brownson, for plaintiff, contended that the right claimed for the defendant is merely a conditional one; and that to entitle him to its benefit, he must shew a compliance on his part with the obligation which he has contracted.

Simon, for defendant, argued to shew, that he was not bound to pay the amount sued for, until two years after the instalments become due, on paying 8 per cent. per annum interest: No interest is yet due on the amount sued for, so that if it be considered as a condition, *it* is not yet forfeited.

2. As to the proof of payment of interest on the second instalment, the benefit given by the act of postponing the payment to two years, is to be applied to each instalment separately; and that the forfeiture of the condition as to one instalment, does not deprive the defendant of the right of delaying the payment of the others.

3. And again, the clause about delaying the payment is a mere stipulation of interest and *not* a condition; and that the

Western District, *September* 1831.

BOREL
vs
FUSILLIER

defendant owes nothing until two years after the *last instalment* becomes due, at which time he will owe the principal and interest.

Porter, J. delivered the opinion of the court.

This action is brought to recover the last instalment of the price of certain slaves, which the defendant purchased of the plaintiff. There was judgment against the former, in the court below, and he has appealed.

The sale was made at *one*, *two*, and *three* years' credit, with a further stipulation, that in case the purchaser choose, he might postpone the payment of the whole price for two years after the last instalment, on paying interest at eight per centum per annum on the amount of each instalment as it became due. There is no evidence on record in respect to the first two instalments; and the appellant contends that, in the absence of all proof relating to them, this action should be considered premature, and must be dismissed; for that if he paid the interest on them, or if he has discharged the principal, he has a right to demand an extension of credit on the last instalment for two years, on paying *interest* at eight per centum.

When a stipulation is made, prolonging payment, on condition that the debtor pays interest annually, the latter must shew a performance of the condition on his part, to entitle him to its benefit.

If the defendant relies on the performance of certain conditions which entitle him to an extension of credit, he must shew by proof a performance—the plaintiff is not required to shew a nonperformance.

We are, however, of opinion that if the defendant intended to rely on the performance of certain acts on his part, which would authorize him to claim an extension of the credit, that it was his duty to establish those facts, and that the plaintiff is not required to shew a nonperformance. The pleadings in this case do not in any manner authorize a different conclusion. The allegation in the petition, that the interest was not paid, is a negative assertion, which, according to the familiar rules of evidence, throws the proof on the adversary.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

Western District, *September* 1831.

BOREL *vs.* FUSILLIER

BOREL vs. FUSILLIER.

APPEAL FROM THE COURT OF THE FIFTH JUDICIAL DISTRICT, THE JUDGE OF THE DISTRICT PERSIDING.

Where a stipulation is made in favor of a party, prolonging the time of payment, on condition that he pays interest annually; he must shew a performance of the condition on his part, to entitle him to its benefit: The plaintiff who sues need not prove a non-performance.

In a claim for a diminution on the price of certain slaves for redhibitory defects; where the testimony is contradictory and not clear, the judgment of the inferior court refusing the claim, will be affirmed.

This suit was instituted to recover of the defendant the two first instalments of the purchase money of seven slaves, sold by the plaintiff to the defendant for three thousand five hundred dollars, on the 28th February, 1828. There was a stipulation in the act of sale, for a prolongation of time, on paying interest, which was invoked on the part of the defendant and which was refused, as not having been complied with on his part. [See the statement in the preceding case for this stipulation.]

The defendant set up a further defence by claiming a diminution of $600 on the whole amount of the price of the slaves, on account of a redhibitory vice or malady in one of them, a woman, who is alleged to have been diseased at the time of the sale, with asthma and dropsey.

There was evidence to show the negro woman was considerably swelled before and at the time, and after the sale, and had difficulty in breathing. The doctor said it was the asthma.

Ursin Prevost deposed that the defendant told him he knew the wench, Mary-Ann, had the asthma at the time he bought her, and for that reason he gave only $200 for her. Had she been sound witness thinks she would have been worth four or five hundred dollars.

The vender warranted the negroes sold, "against all redhibitory vices and diseases whatever.

There was judgment against the plaintiff for 2066 dollars

with eight per centum per annum interest from the time the two instalments became due, until paid.

The defendant's claim of diminution in price, &c., was rejected, as not having been established.

The defendant appealed.

Bowen for plaintiff.

Simon for defendant.

Porter, J. delivered the opinion of the court.

The plaintiff claims a sum of money from the defendant, due for slaves sold to him. There was judgment in the court of the first instance, in favor of the former, from which the latter has appealed.

One of the questions in the cause is settled by a decision made a few days since in this court between the same parties. The other relates to a claim set up for a deduction in the price, owing to redhibitory defects in the property purchased. The evidence on that head is contradictory; and we do not think it presents such a preponderance on the part of the appellant, as to authorize us to disturb the judgment of the inferior court.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

The allegation that interest was not paid is a negative assertion, which according to the rules of evidence, throw the proof on the adversary.

When a stipulation is made in favor of a party, prolonging the time of payment, on condition that he pays interest annually; he must shew a performance of the condition on his part, to entitle him to its benefit: The plaintiff who sues need not prove a non-permance.

In a claim for a diminution on the price of certain slaves for redhibitory defects; where the testimony is contradictory and not clear, the judgment of the inferior court refusing the claim, will be affirmed.

**MOORE (COLLINS' ADMR.) vs. LOUAILLIER & AL.*

APPEAL FROM THE COURT OF PROBATES OF THE PARISH OF ST. LANDRY.

A mortgage cannot be shewn to exist by parol testimony. But the right to a mortgage, resulting from the transfer of a claim, to which a mortgage is attached, may be proved by parol evidence.

The law requires a notary to make a memorandum at the foot of a note

**Note* —This cause was argued at the September term, 1829, and suspended on a petition for a rehearing, which was granted at the September term 1830. At this term the cause was reargued. The court adhered to their former opinion, then delivered.

Western District, *September* 1831.

MOORE, COLLINS' ADM'R vs. LOUAILLIER ET AL

given for the payment of a sum, secured by a mortgage; but it does not require him to certify the transfer of such note, or any one which is given on renewal of the original note.

The process verbal of sale of an estate, made by the judge of probates, subscribed by the purchaser and his sureties, which stipulates or secures a mortgage on the property sold, is considered of record in the parish judges office by being deposited and put on file in the office. It is thus deemed recorded, according to the requirements of law.

This case arose on the opposition of several creditors to the homologation of the tableau of distribution of the estate of M. Collins, deceased.

On the 20th of October, 1828, William Moore, administrator of M. Collins' estate, filed his tableau in the court of probates, and prayed for its homologation.

Joseph Andrus made opposition, on the ground that he was placed on the tableau as an ordinary creditor, when he should have been allowed the benefit of the vender's privilege on the proceeds of a tract of land, sold by Jesse Andrus to Collins in his life-time, and making part of his estate at his death, which was sold by his administrator.

The opponent claims as assignee, or endorsee, of his son Jesse Andrus. The latter, in October, 1818, sold to Collins a tract of land for $4700, retaining a mortgage or privilege until payment. In July, 1821, Collins executed *a new note* to Jesse Andrus for $1623, the balance then remaining due of the original purchase. In December, 1823, Jesse Andrus, by endorsement, transferred this note to his father, Joseph Andrus; and in February, 1829, during the pendency of this contest, Jesse Andrus executed to his father an act, under private signature, in which the *new note* for $1623 was again transferred, and particularly described as being given for the balance due on the purchase of the tract of land which Collins had bought of Jesse Andrus; and that it was intended, in the transfer of the note, that the vender's privilege or mortgage on the land, or its proceeds, should go with it.

Joseph Andrus offered in evidence on the trial, the note

of Collins, which had been transferred, and the private act of Jesse Andrus, to him executed a few days before the trial, in February, 1829; and also parole evidence to shew that the note in question was the same which had been given for the purchase of the land by Collins. The evidence was objected to:

1st. The note did not correspond with the one mentioned in the act of sale of the land.

2d. It would be allowing a mortgage to be made out by parole agreement, if parole evidence was received to connect the note with the act of sale and mortgage.

3d. The act of Jesse Andrus would be allowing the party to make testimony for himself, if admitted; and also permitting the *descendant* of the opposing creditor to give evidence for him, which is prohibited.

The probate judge decided in favour of the mortgage.—The administrator appealed.

Louaillier, friere, claimed to be a privileged creditor, which was denied him by the administrator.

He claimed to be a privileged creditor, as the assignee of a note for $1479 68, given by Collins for the purchase of four slaves at the sale of the community property between John Andrus and his late wife. This sale was made at the *request* of John Andrus, by the parish judge, in his capacity of auctioneer. A mortgage was retained in the *proces verbal* of sale on all the immoveable property and *slaves;* and it was expressed in it that the sale was made *judicially.*

The *proces verbal* of this sale was made up into a manuscript book, the leaves sewed together, and *filed* away in the parish judge's office. This was all the record ever made of it, and it was the custom of the judge to *file* in his office all documents of this description, and which he considered as *of record,* in his office. The administrator contended that this was not a recording of the mortgage, within the meaning of the law. The judge of probates decided it was, and allowed the mortgage. The administrator appealed.

Western District, September 1831.

MORE, COLLINS' ADM'R vs. LUAILLIER ET AL

Garland for the administrator and appellant.

1st. Parole testimony cannot be received, to prove the connexion between the note assigned by Jesse Andrus to the appellee, and the mortgage which, it is pretended, was retained on the land and assigned, to secure the payment of the note; because it would be, in effect, proving a mortgage by parole, which cannot be done.—*Civil Code*, p. 452, art. 5, 6. *La. Code*, art. 3272.

2d. The law points out the manner in which notes secured by a mortgage are to be connected with the act that secures their payment;—which is, by the notary who passes the act stating on the note, (or marking it *Ne varietur*,) that it is secured by a mortgage.—2 *Moreau's Dig.* 70, § 4.

3d. This testimony is inadmissible, because it is the statement of Jesse Andrus, the obligee and endorser of the note, and the son of Joseph Andrus, to whom it is transferred; and the acknowledgment of Collins, the insolvent debtor. The statements of Jesse Andrews cannot be received, he being the person in whose favour the stipulation is made, and the son of the *endorsee:* nor the acknowledgements of Collins, in a contest between the creditors of his insolvent succession.—3 *Mar.* 256. 12 *do.* 157. 2 *Mar.* N. S. 608.

4th. The *proces-verbal* of the sale under which *Louaillier, frere*, claims to have a mortgage on the proceeds of Collins' estate for the price of four slaves, was not made by order of the court of probates, or by the judge acting in the capacity of judge of probates, but simply as auctioneer, and at the request of John Andrus. No record was ever made of this proces verbal of sale, in which Louaillier's mortgage was retained. It consists of sheets of paper sewed together and filed away in the parish judge's office. The law requires it should be inscribed in a record book in the office of the parish judge, or recorder of mortgages in the parish where the property is situated, to have effect against third persons.—1 *Martin*, N. S. 384. *Civil Code*, p. 464, 6, art. 52, 63. *La. Code*, 3314, 3334. 2 *Moreau's Dig.* 285.

Bowen for the opposing creditors and appellees.

1st. Joseph Andrus has shewn the existence of the mortgaged debt and its transfer by endorsement and private act. Parole evidence is admissible to shew the written agreement did not include the whole contract, and will be received to supply its place.—2 *Starkie*, 1048.

2d. If Jesse Andrus, the son, be not allowed to make evidence for his father, he can transfer his claims to him, and the writing and endorsement are necessarily evidence of such transfer.—9 *Touiller*, 263–4, no. 159, 160, 161, 162.

3d. The provisions of the Civil Code, and the statutes with regard to the recording of mortgages, simply direct that all instruments stipulating a mortgage, other than those executed in New-Orleans, shall be recorded in the office of the parish judge where the mortgage property is situated; but does not prescribe the *manner* of recording.—3 *Mor. Dig.* 188. 6 *Martin*, N. S. 120. 3 *Martin*, N. S. 348.

4th. Parish judges being thus left without explicit directions on the subject, have adopted a different manner of recording; some pursuing the English manner, of preserving the original enrolment as a record, by filing away the proces verbal of sales stipulating mortgages.

5th. A *record* is a memorial of a proceeding, or act of a court of record, entered in a roll of parchment; for the preservation of it.—*Co. Litt.* 117, C. 26, a. *Com. Dig.* title Record, letter A.

6th. An affidavit read and filed, becomes a *record* of the court.—2 *Wilson*, 371. A court of record is that where the acts and judicial proceedings are enrolled in parchment, which rolls are called the records of the court.—3 *Black.* 24, 292.

Martin, J. delivered the opinion of the court.

The administrator complains of the judgment of the court of probates sustaining the oppositions of Andrus, and Louallier to the tableau of distribution.

Western District, *September* 1831.

MOORE, COLLINS' ADM'R *vs.* LOUAILLIER ET AL.

Andrus, endorsee of a note given by the deceased, for the balance due on a former note, given to secure the price of a tract of land, complained he was placed on the tableau as a mere chirographery creditor, while he was a privileged and hypothecary creditor on the proceeds of the sale of the land.

Louallier complained that he is placed as assignee of the claim of the price of certain slaves, bought by the deceased at a probate sale, as a chirographery creditor, while he ought to be placed as a privileged or mortgage creditor therefor.

The claim of Andrus was resisted on the ground that as he was the endorsee, given for a balance due on a larger one, for the price of a tract of land, he could not avail himself of the privilege or mortgage which attached on the former note.

It is urged the note in the opposing creditor's possession, is not on its face connected with the act of sale, on which the privilege or mortgage arises, and cannot be shewn to be so, by parole evidence; to permit this being done, would be to give effect to a parole mortgage, contrary to the provisions of the *Louisiana Code*, art. 3272; and the notary ought to have made a memorandum at the foot of the note.—2 *Moreau's Dig.* 70, § 4.

A mortgage cannot be shewn to exist by parol testimony. But the right to a mortgage, resulting from the transfer of a claim, to which a mortgage is attached, may be proved by parol evidence.

We think that, although it is certain that a conventional mortgage cannot be the result of a parole agreement, the right to the mortgage resulting from the transfer of the claim to which the mortgage is attached, may be proved by parole testimony.

The law requires a notary to make a memorandum at the foot of a note given for the payment of a sum, secured by a mortgage; but it does not require him to certify the transfer of such note, or any one which is given in renewal of the original note.

The law requires the notary to make a memorandum at the foot of a note, given for the payment of a sum secured by a mortgage; but it does not require him to certify the transfer of such a note, or any which is given as a renewal of the former.

Louaillier's pretensions were set aside on the ground that his mortgage was not registered in the office of the parish judge. The privilege or mortgage results from the proces verbal of the estate of a deceased person, sold by

the judge of probates. The purchaser and his sureties subscribed that part of the proces verbal of sale, which relates to the slaves bought. This proces verbal is on file, and consequently is a record of the court of probates. The parish judge is *ex officio* judge of probates and notary public. He is not expected to keep distinct offices, as parish judge, judge of probates, and notary public. Were he to keep distinct offices in such capacities, he would be the keeper of these several offices, they would be severally his offices. Whether he keep one or more offices, he is the keeper of all the papers in the one, or all of them. Hence, in the case of Martel et al. vs. Tureaud's heirs, (6 *Martin*, N. S. 121,) we held that any deed passed before a parish judge, in his notarial capacity, relating to property situated in his parish, does not require any transcription, or further inscription, to give it effect against third parties. Our decision must be the same with regard to an act of sale, received by him as judge of probates.

We think the court of probates did not err, in sustaining the opposition of the appellees.

It is therefore ordered, adjudged, and decreed, that the judgment of the court of probates be affirmed, with costs.

Western District, *September* 1831.

MOORE, COLLINS' ADM'R *vs.* LOUAILLIER ET AL.

The proces verbal of sale of an estate, made by the judge of probates, subscribed by the purchaser and his sureties, which stipulates or secures a mortgage on the property sold, is considered of record in the parish judges office by being deposited and put on file in the office. It is thus deemed recorded, according to the requirements of law.

TRIMBLE vs. MOORE.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

In actions of slander and defamation of character it is sufficient to sustain the action, to prove in substance the words charged to have been spoken.

In cases of this kind, slanderous words spoken, are not to be construed in a technical manner, but taken in their popular sense, and considered in relation to the idea they were intended, and might convey to the by-standers, or company to whom they were addressed.

Interest will not be allowed on a verdict finding a specified sum in damages. And if the judgment gives interest, even from the signing it, it will be reversed.

This is an action of slander, for slanderous words spoken of and concerning the plaintiff, by the defendant.

Western District, *September* 1831.

TRIMBLE *vs.* MOORE.

The petition sets out, that the plaintiff is a good and honest citizen of his parish; that the defendant maliciously and falsely charged him, in the presence of many persons, of having "stolen three hundred dollars in money and notes, and had runaway;" and further, that the plaintiff "had stolen three hundred dollars from him (the defendant) and runaway:" thereby meaning to charge the plaintiff, whilst acting as his (the defendant's) clerk with the crime of theft," &c. He lays his damages at three thousand dollars.

The defendent pleaded the general issue; and that he had only said the defendant "had taken notes and papers of his, without his consent, and deprived him of the power to collect moneys due him."

The evidence showed that Trimble had been in the employ of Moore as a clerk: they disagreed in settling their accounts, and Trimble on leaving took notes, accounts, and papers from Moore to collect and secure himself to the amount of his claims. When Moore heard of it he, in a passion, said "Trimble had taken from his store the amount of two or three hundred dollars in money, notes and papers, and had runaway with them;" "and damn him he would catch him and fetch him back."

There was a verdict for the plaintiff of five hundred and fifty-five dollars in damages, and judgment thereon allowing judicial interest from its date.

The defendant appealed.

Garland for plaintiff contended that the case was completely made out by the evidence, and urged the affirmance of the judgment.

Bowen for defendant. The evidence does not support the charge as laid in the petition, and the slanderous words are not proved as alleged to have been spoken.—*Rex vs. Horn*, 2*d Cowp.* 2 *Russ. on Cr.* 1036.

2. There is no interest claimed or found by the jury: the judgment allowing it is erroneous.

Brownson, on the same side, commented on the case of

Freeland vs. Lanfear, 2 *Martin, N. S.*, 257, and argued to show that not even the substance of the charge was proved, &c.

Porter. J. delivered the opinion of the court.

This is an action of defamation. There was judgment in the court of the first instance for the plaintiff, and the defendant appealed.

The petition alleges, that the defendant "in substance charged the plaintiff with having stolen three hundred dollars in money and notes, and having runaway." The words proved on the trial were, "that the plaintiff had taken from defendants store to the amount of two or three hundred dollars in money and notes, and had runaway with them," the defendant adding, "damn him he would catch him and bring him back."

In actions of slander and defamation of character it is sufficient to sustain the action, to prove in substance the words charged to have been spoken.

It seems conceded by the counsel on each side, and so indeed is the law, that it is sufficient in cases of this description, to prove in substance the words charged to be spoken, and the argument has turned principally on the compliance or non-compliance of the plaintiff in this case with the rule. A good deal of ingenuity has been exercised to shew that the words spoken did not import a charge of felony, but of trespass. We need not enquire whether the expressions used amount to a technical definition of the offence, and whether if put in an indictment they would not fail in legal precision. We must consider the words in their popular sense, and examine what idea they were intended to convey, and might convey to the by-standers to whom they were addressed. Considered in this point of view, we are of opinion that the defendant intended an accusation of theft, and that the words used conveyed such an idea. He charged the plaintiff with having taken his property. Had he stopped there, it might perhaps have amounted to nothing more than an accusation of tresspass, but coupled with the assertion that he had runaway with it, and that he the defendant would catch him and

In cases of this kind, slanderous words spoken, are not to be construed in a technical manner, but taken in their popular sense and considered in relation to the idea they were intended, and might convey to the by-standers, or company to whom they were addressed.

Western District, *September* 1831

TRIMBLE vs. MOORE

bring him and back—a higher offence is imputed. For if these allegations had been true—if the plaintiff had taken the property—if he had runaway with it—and if the defendant had been compelled to follow him to get it back, there would have been sufficient to place the plaintiff, to say the least of it, in a very delicate position before a jury on a prosecution for larceny.

One of the witnesses who testified to the declarations of the defendant, states that the impression produced by them on his mind was, that the plaintiff had taken the property without permission, and that he could not stay longer at the witnesses house unless he cleared his character. This understanding of a person who heard the conversation has been much relied on, to shew that those to whom the observations were addressed, did not consider the defendant to make an accusation of larceny. We do not know whether the witness believed a taking without permission to be a theft or not—he leaves it doubtful, by declaring he considered the accusation so serious, that without a proper explanation of the plaintiff's conduct he must remove from witnesses house.

But supposing this witness did so understand the words, the other by-standers may have affixed a different meaning to them; and the right of the plaintiff to obtain compensation for a charge of a very serious nature, should not be impaired because some may have understood it in a milder sense than that which the language used most certainly conveyed.

Interest will not be allowed on a verdict finding a specified sum in damages. And if the judgment gives interest, even from the signing it, it will be reversed.

The court below gave interest on the amount of damages found by the jury, and there is error in this, for which the judgment must be reversed.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed. And it is further ordered, adjudged, and decreed that the plaintiff do recover of the defendant the sum of five hundred and fifty-five dollars, with costs in the court of the first instance; those of appeal to be paid by the plaintiff and appellee.

MARKHAM vs. CLOSE.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE THEREOF PRESIDING.

The infliction of cruel punishment, on the slave by his master, is a criminal offence which must be punished by a criminal prosecution, and not in a civil action.

Maiming, mutilating, or cruel or inhuman treatment of a slave, is a public offence, and must be prosecuted criminally; and after conviction, the fine and other penalties for such conduct, are to be levied on the offender by the court before whom the conviction takes place.

The Civil Code treats, alone, of private rights of individuals, and the various interests growing out of property; but it may, in the mean time, provide in what cases a breach of the penal laws, brings with it a *forfeiture of private rights.*

This is an anomalous action, instituted in a *civil* form, to punish a *criminal* offence.

D. K. Markham, without alleging any title to the slave, or having any individual interest in the cause, appears as public prosecutor; and on the 17th of June, 1830, presented his petition to the district judge at chambers, alleging that the defendant had cruelly beat and maltreated one of his slaves, named Augustin, and prayed that the said slave be taken out of his master's possession and sold, and placed out of his reach and power; the proceeds of sale, after paying such *fine* as might be adjudged, and the costs of this suit, to be returned to the master.

The defendant appeared before the judge at chambers, and after being heard by his counsel, the judge ordered the cause to be docketed, and tried as a civil case.

At the November term 1830, the defendant's counsel filed peremptory exceptions to the form of action, alleging that it was unknown to the law, and that all the proceedings are null and void. The exceptions were overruled, and an answer put in on the merits. A bill of exceptions to the decision was taken.

The answer alleges that the slave Augustin is a runaway, and that when he received the chastisement complained of, he had just been brought back from the Mississippi, after ab-

Western District, *September* 1831.

MARKHAM *vs.* CLOSE.

sconding for a considerable time. That he had him whipped with a whip in the manner he was authorized to do by law.

Parole testimony of several witnesses who saw the negro shortly after he had been flogged, was received. He was severely whipped, and his back and hips very much cut and skinned. The weather being warm, the wounds smelled badly; the negro was obliged to lie on his belly, being unable to sit or lie in any other position.

P. Negat, a neighbor of the defendant, says he flogged the negro, by order of the master, when first landed. At first he gave him twenty-five or thirty lashes, with a whip. That on the way to his master's he became sullen, and refused to go, when he gave him ten or twelve lashes more over the shoulders. The master came, and the negro still refusing to go with either of them, the master had him whipped again. The negro is disobedient, and a runaway. He says he knows the defendant, and that he is not a cruel or severe master.

The jury simply found a verdict for the plaintiff. The defendant then moved for a new trial: first, on the ground that the verdict is contrary to law and evidence; secondly, that it does not find any thing in fact for the plaintiff, or grant any thing prayed for in the petition. The new trial was refused.

There was judgment on the verdict, decreeing the slave to be sold, and placed out of the power of his master, who is convicted of having cruelly beat and maltreated him; and the balance of the proceeds of the sale, after paying the costs of the prosecution, be paid over to the defendant. He, the said defendant, not being allowed to purchase the slave, having refused on the trial to purge himself, on oath, of the charge of cruel treatment of said slave. The defendant appealed.

The prosecution is founded on the 192d article of the *Louisiana Code*, and a clause in the *Black Code*, 1 *Moreau's Dig.* 118, § 17.

Lewis and *Markham* for plaintiff.

The question in this case is, whether a slave can be taken from his master or owner, for cruel and inhuman treatment, by a *criminal* or *civil* process? We think it may be done by the latter.

1st. It is expressly provided by the Civil Code, that the master or owner of a slave shall not chastise him with *unusual rigour*, or maim or mutilate him so as to expose his life, or cause his death.—*La. Code*, 173.

2d. When the master is guilty of cruel treatment towards his slave; the judge shall, besides inflicting a penalty, cause the slave to be sold, and placed out of the power of his master.—*La. Code*, art. 193.

3d. The law provides that when slaves are cruelly treated by not providing food, clothing, and lodging, complaints may be made to a justice of the peace in favor of the slave, for redress. And in case of beating or maiming slaves, the master and owner may be fined, and made to pay a penalty, if found guilty.—1 *Moreau's Digest*, 111, § 39. *Ibid*, 118, § 16, 17.

Garland and *Linton* for defendant:

It will be seen from the evidence, that the chastisement inflicted by the defendant on his slave, was with one of the weapons excepted by law: and that portion of the *Black Code*, and the 192d article of the *Louisiana Code*, relied on by the plaintiff, contemplates a *conviction* before a forfeiture.

2d. The law of forfeiture had its origin in the feudal system, and was intended to enlarge the prerogatives and resources of the crown. But it is now different, and in this country no man can be deprived of his property without his consent; nor can a forfeiture take place before conviction of the offence by a criminal proceeding.—2 *Bac. Abr.* 577, 582, 679. 4 *Black. Com.* 432.

3d. The *Black Code* fixes the penalty of cruel treatment to a slave, which can only be enforced by a criminal proceeding; and as the defendant has never been convicted of

Western District. *September* 1831.

MARKHAM *vs.* CLOSE.

cruel treatment, his slave cannot be taken from him and sold. 1 *Moreau's Dig.* 118, § 16. *La. Code*, art. 192. *Old Civil Code*, p. 34, art. 27.

Porter, J. delivered the opinion of the court.

This action was commenced by the plaintiff, to compel the defendant to dispose of one of his slaves. The petition charges him with having beat, and cruelly treated the slave, and with a gross abuse of the power which the law has conferred on the master.

There were several exceptions pleaded to the petition, and on being overruled, an answer on the merits was put in. The cause was submitted to a jury, who found a verdict for the plaintiff. On this verdict the court directed the slave to be sold, the proceeds to be first applied to the costs of this suit, and the balance to be paid to the defendant.

The defendant has appealed. The record brings before us the evidence on which the jury rendered the verdict, and that evidence seems to fully support the conclusion to which they came. It is greatly to be deplored, that owners of slaves should abuse their authority, and violate the duties of humanity. But the punishment which the law has provided for their misconduct, can only reach them in the mode, and through those forms of proceeding, which that law has prescribed.

One of the exceptions which the judge *a quo* overruled, was, that the plaintiff had no right to institute any suit or proceeding against the defendant, and that the court had no jurisdiction of the case. We think this objection was correctly made, and that it should have been sustained.

We come to this conclusion from the language of the statutory provisions on this subject; their obvious meaning; and the considerations of public policy, which we cannot suppose to have been disregarded by the legislature, when they acted on a matter of so much importance to the peace and safety of society.

The 16th section of the *Black Code* provides that, "if any person whatever shall wilfully kill his slave, or the slave of another person, the said person being convicted thereof shall be tried and condemned agreeably to the laws of the territory; and in case any person or persons should inflct any cruel punishment, except flogging, or striking with a whip, leather thong, switch or small stick, or putting in irons, or confining such slave, the said person shall forfeit and pay for every offence, a fine not exceeding $500, and not less than $200."

The infliction of cruel punishment, on the slave by his master, is a criminal offence which must be punished by a criminal prosecution, and not in a civil action.

The 21st section of the same code declares that, the fines not exceeding twenty-five dollars, which are ordered by the act, shall be recovered before a justice of the peace, and those which are above twenty-five dollars, shall be recovered before a competent tribunal.

The 16th section, already referred to, provides for the wilful killing of a slave, and directs the trial for such offence to be according to the laws of the (then) territory. There can be no doubt this killing is regarded as a criminal offence, and that the trial here spoken of is the same as that which takes place when any other crime is committed.

In the same section, and immediately following the provisions in relation to killing, the law treats of offences against the person of a slave *less* than killing, and punishes them by fine. No good reason suggests itself to us why mutilating a slave, should not also be regarded as an offence which amounts to a crime, and punished as such. The circumstance of a pecuniary penalty being alone inflicted for the injury, by no means deprives it of the character just given to it. That has to be ascertaind by the inquiry, whether it affects the peace and good order of society. The law already cited considers it a public offence to kill a slave; and, maiming and mutilating one, should fall under the same denomination. The penalty is given to the state by the same language which provides for fine in regard to all other crimes:

Maiming, mutilating, or cruel or inhuman treatment of a slave, is a public offenee, and must be prosecuted criminally; and after conviction, the fine and other penalties for such conduct, are to be levied on the offender by the court before whom the conviction takes place.

Western District, *September* 1831.

MARKHAM *vs.* CLOSE.

no other mode of enforcing it is pointed out different from that given for the penalties affixed to offences against the property or person of the free citizen. We conclude, therefore, that it should be prosecuted in the same way these offences are, and by the same officer.

The article in the Code on which the present action is brought, strengthens the construction we put on this statute, and shews, at the same time, the error committed in addressing this complaint to the judge, in the exercise of his civil jurisdiction. It is in these words: "No master shall be compelled to sell his slave but in one of two cases, to-wit: The first, when being only coproprietor of the slave, his coproprietor demands the sale, in order to make partition of the property: the second, when the master shall be convicted of cruel treatment of his slave, and the judge shall deem proper to pronounce, *besides the penalty established for such cases*, that the slave shall be sold," &c.—*La. Code*, art. 192.

The conviction here spoken of which must precede the order to sell, we think, evidently means condemnation, or a criminal prosecution. The term cannot be correctly applied to a judgment pronounced in a civil case; and we are not, at this moment, aware of any instance in which the legislature have so used it. Admitting that, from inadvertence, it might be so employed in relation to a civil suit, the *subsequent* clause of the statute takes away all pretence from so interpreting it in this instance; for it connects the direction to sell the slave, with the same decree which inflicts the other penalty provided by law, namely, fine; cumulates the two punishments in the same prosecution; and clearly contemplates that the order to sell, is to be made in those proceedings which the state may institute, to enforce the pecuniary penalty, and *only as a consequence* of the master being convicted of an offence which exposes him to that penalty.

The civil code treats, alone, of private rights of individuals, and the various interests growing out of property; but it

It was argued that the *Louisiana Code* only treats of civil rights and obligations, and that it cannot be presumed, when it speaks of penalties and forfeitures, to have reference to

the criminal law. It is true, our Code professes to regulate property, and the various interests which men may acquire in it; but in doing so, it is neither out of the scope or object of such a work, to provide in what cases a breach of the penal law may bring with it a forfeiture of private rights. Thus we find in the Code, that tutors cannot be taken from those persons on whom the penal law has inflicted disabilities, and that the child may be disinherited who has committed a crime, or accused the parent of one.—*La. Code*, 322, 1613. The case is so clear a one, that we are not under the necessity of resorting to the obvious considerations of policy which, we must suppose, would have prevented the legislature from intrusting so delicate a matter to the interference of any, and every individual in society. Every consideration which induces the state to take the prosecution of offences against her peace and her dignity into her own hands, and forbids the interference of private passions with the vindication of her justice, most emphatically applies in cases as that before us. The individual who interfered in this instance may, we believe was, actuated by feelings which we cannot but respect. But what in this instance was the suggestion of humanity, might, in the next, be the promptings of envy, malice, and all uncharitableness.

may, in the mean time, provide in what cases a breach of the penal laws, brings with it a *forfeiture of private rights*

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed. And it is further ordered, that the cause be dismissed, the petitioner paying costs in both courts.

ANDRUS ET AL. vs HARMAN ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

An action cannot be sustained, to set aside a former judgment of the same court, unappealed from and unreversed. It forms *res judicata* between the parties.

A suit to recover damages against intervenors or third parties in a former suit, and who obtained judgment and dismissed the plaintiff's attachment

Western District, *September* 1831.

ANDRUS ET AL. *vs.* HARMAN ET AL.

suit, is *wholly untenable*, while such judgment stands unreversed and unappealed from.

The supreme court cannot examine a judgment of the district court unless brought before it by an appeal in the case itself, or when an action of nullity is properly brought and carried up.

This suit is commenced to compel the defendants to pay damages for intervening in a former suit, and procuring the dissolution of an attachment sued out, and the *alleged illegal* dismissal of the plaintiff's suit.

The petitioners allege they commenced a suit against one James M'Clelland, in March, 1829, to recover a note of $190 given for a partnership debt, in the purchase of cattle.

When the suit was called for trial, at the November term of 1830, the defendants, being judgment creditors of McClelland intervened, and procured the dismissal of the attachment and suit, and had judgment for the property in contest.

The present suit was instituted in May 1831, alleging that the former suit was illegally dismissed, by which they lost the amount of the property attached. They claim damages of the defendants for these proceedings and the costs of the former suit, and pray to have the attachment reinstated, and the money received by the defendants refunded, &c.

There was no appeal from the judgment of the district court dismissing the former suit and attachment. The defendants filed peremptory exceptions to the plaintiffs form of action.

The present suit was also dismissed, as going to set aside the judgment of a former court, which stands unreversed and unappealed from.

The plaintiffs appealed.

Linton, for plaintiffs and appellants, contended that inasmuch as the intervenors had shewn on the pleadings no interest; had set up no right of property equal or superior to the seizing creditor in the original attachment suit, the court below was wrong in dismissing it. That the strongest proof

was required on the part of the debtor himself, to justify the court, at his instance, in dissolving an attachment—*a fortiori*, when third persons who changed the issue between the original parties demanded it.

2. The court can inquire into the validity and regularity of a former judgment, collaterally and unappealed from when it is apparent that enormous injustice has been done to a seizing creditor, by illegal proceedings on the part of third persons not parties, originally to the suit.—*Code of Practice, art.* 389 *to* 394. 12 *Mar.* 533. 5 *Mar. N. S.* 499. 8 *Mar. do.* 513—519.

The judges declared from the bench such an action as this could not be maintained. They refused to hear argument on the other side.

Porter, J. delivered the opinion of the court.

The petitioners state, that they commenced an action by attachment against one McClelland, who was their debtor, and were proceeding to obtain final judgment against him, when the defendants intervened in the suit, and by their intervention procured a judgment of the district court, which illegally set aside the attachment, and dismissed the petitioners action.

The petition charges this intervention to be illegal and improper—that the judgment of the court was erroneous—that the petitioners had a just cause of action—that they filed exceptions to the petition in intervention, which the court disregarded—and that in consequence of these illegal proceedings, they have suffered damage to the amount of five hundred dollars.

It concludes with a prayer, that the attachment suit against M'Clelland may be reinstated, and that the defendants may pay the damages already stated.

To this petition the defendants put in the plea of *res judicata*, which the court below sustained, and the petitioners appealed.

An action cannot be sustained to set aside a former judgment of the same court, unappealed from, and unreversed. It

Western District, *September* 1831.

ANDRUS ET AL *vs.* HARMAN ET AL

The court did not err in doing so. The action is of a very novel character, and wholly untenable. It is an attempt to recover damages from the defendants for being parties to a suit in which judgment was rendered against the plaintiffs, and that without any allegation of fraud on their part. This cannot be done. To enable us to give judgment for the plaintiffs, we must examine the correctness of the decree in the other suit, and while it stands unreversed, we have no authority to do so. As we said in the case of Dufour *vs.* Camfranc, the validity of a sentence rendered by a court of competent jurisdiction cannot be enquired into collaterally It is as a plea, a bar, or evidence, conclusive between the parties. The errors which it may contain, were questions for the decision of the court which tried the cause, and we have no power to examine how they were decided, unless regularly brought before us by appeal; or by an action of nullity in those cases where the law affords such remedy.—11 *Martin*, 608.

It is therefore ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.

forms *res judicata* between the parties.

A suit to recover damages against intervenors or third parties in a former suit, and who obtained judgment and dismissed the plaintiff's attachment suit, is *wholly untenable*, while such judgment stands unreversed and unappealed from

The supreme court cannot examine a judgment of the district court unless brought before it, by an appeal in the case itself, or when an action of nullity is properly brought, and carried up.

BRASSEUR, WIFE OF FRA'S RICHARD vs. HER HUSBAND ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

The plaintiff or party who succeeds in a suit, has a right to recover his costs, from those against whom he obtains judgment.

But where there are two sets of defendants or parties, having distinct interests, as far as the judgment operates in each distinct interest or party, each one must pay his proper proportion of the costs accruing in his controversy with the plaintiff.

The petitioner alleges she was married to one François Richard in 1823, and in 1824 Louis Richard obtained judgment against her husband for a sum of money, and in 1826, finding her husband much embarrassed, she obtained final judgment of separation of property, for the sum of $1884 77,

the amount she brought into marriage; that before her judgment was satisfied, the heirs of Louis Richard, now deceased, had issued execution against her husband, and seized his property, to satisfy the judgment of their deceased father. She obtained an injunction against the plaintiffs in execution and *her husband*, and applied the property seized to the payment of her judgment. The district court, in giving judgment in her favour on the injunction, refused to allow her the costs of the injunction suit against the defendants, whose execution was enjoined, because they were induced by a common error between the parties, to levy on the property enjoined. Judgment for costs was only given against the husband, who was insolvent.

The plaintiff alleged she ought to have judgment for her costs against all the defendants, and on refusal, she appealed.

Garland for plaintiff:

1st. Costs are accessary to the judgment, and must be paid by the party cast in the suit.—*Code of Practice*, art. 549, 550, 551, 552. 11 *Mar.* 577. 10 *do* 115. 2 *Mar.* 307.

2d. The costs belong to the plaintiff, when there is judgment in his favor.—*Code of Practice*, 548.

Lewis for defendants:

The plaintiff committed an error by receiving judgment against her husband for more than was due to her. The defendants acted in good faith, and the error (if any) committed by them in their seizure of the husband's property, was caused by the fault of the plaintiff and her husband; and as the latter was the real debtor, he should pay all costs, and the plaintiff is bound to look to him.

2d. Costs are to be paid by the party cast in the suit: and as the plaintiff's injunction against the defendants, except François Richard, was only partially sustained—the plaintiff, too, having errors to correct on her part—it is but justice, and the law, that she hould look to the defendant, François Richard, alone, for her costs.—*Code of Practice*, art. 549.

Western District, *September* 1831.

BRASSEUR, WIFE OF F. RICHARD, *vs.* HER HUSBAND ET AL.

Porter, J. delivered the opinion of the court.

In this action the husband of the plaintiff, and other persons who had recovered a judgment against him, were made defendants, and the suit was instituted and prosecuted with a twofold object, one was to correct certain errors in a judgment which the plaintiff had obtained against her husband, and the other was to prevent the codefendants, who had issued execution against her, from enforcing that execution on property which the petitioner alleged had been set apart and delivered to her, in virtue of the judgment of separation.

The court below rendered a judgment, on the merits of which neither party complains, but the plaintiffs and appellants aver, there is error in it as relates to the costs. The court considering the plaintiffs in execution against the husband, to have been led into error by his conduct, decreed that he should pay all the costs. In this we think it erred. As between them and him the equity of such a direction may be admitted, but as between the plaintiff and the other parties, it is by no means so obvious. It may be true; indeed there is evidence on record of the fact, that the husband is insolvent; and the consequence of giving judgment against him for the whole costs, will be, that if he should be unable to pay them, the burthen of them will fall on the plaintiff. She has a right to recover her costs from those against whom she obtained judgment.

The plaintiff or party who succeeds in a suit, has a right to recover his costs from those against whom he obtains judgment.

The language of the *Code of Practice* is express on this point, and if any case would authorize an exception to the rule, we do not think this case to be such a one.—*Code of Practice*, art. 549.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be annulled, avoided, and reversed: and, proceeding to give such judgment here, as in our opinion should have been given below, it is ordered, adjudged, and decreed, that the act of sale mentioned in the pleadings, from the defendant, François Richard, to the plaintiff, be confirmed; that she take the property therein

mentioned, in full satisfaction of the amount stated to be due in the said act of sale; that she also recover from the defendant, her husband, the sum of thirty-nine dollars and seventy-three cents, with legal interest thereon, at the rate of five per centum per annum, from the day of the signing the judgment in the district court, until paid. And it is further ordered, that the injunction sued out in this case be dissolved, except so far as regards any of the property mentioned and conveyed in the said act of sale, and as to that, it be perpetuated. And this court, proceeding to determine the liability of the parties as to the payment of the costs of the suit, order and decree that the defendant, François Richard, pay so much of the costs as have accrued in the controversy between him and the plaintiff for correcting the errors complained of; and the defendants in the injunction pay all the cost thereof: the costs of this appeal to be paid by the appellees.

But where there are two sets of defendants or parties having distinct interests, as far as the judgment operates in each distinct interest or party, each one must pay his proper proportion of the costs accruing in his controversy with the plaintiff

---

MUGGAH vs. GREIG.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE DISTRICT PRESIDING.

Where a slave is claimed and held as having been purchased for the defendant and with his funds, but the title is taken in the name of the person making the purchase, parol testimony is *inadmissible*, to prove that the purchaser acted as the agent of the defendant, and bought the slave with his funds.

Written evidence must be produced to prove the *agency* of another, in making a contract of sale or purchase or transfer of immoveables or slaves, which is required by law to be in writing.

So where a person buys a slave and takes the title in his own name, and another person claiming him as having been purchased for him and with his funds, he must shew a written authority to purchase, in order to hold or recover the slave.

This suit is brought by the plaintiff as heir of John Muggah, to recover from the defendant a negro boy, which is alleged to have been purchased by John Muggah in New

Western District, *September* 1831.

MUGGAH *vs.* GREIG.

Orleans, who took the act of sale in his own name and right. The defendant took possession of the boy and holds him on the ground that Muggah purchased the negro with the defendant's money. The petition prayed that the boy be delivered up; or in lieu thereof, that the defendant be decreed to pay eight hundred dollars, the value of him.

The defendant alleged that John Muggah acted as his agent, and that he purchased the negro boy in New Orleans with his (defendant's) funds. That on his return he delivered possession of the boy to the defendant.

There was judgment decreeing the plaintiff the possession of the boy; but allowing the defendant 450 dollars, which appeared to have been advanced by him to John Muggah, in his life time, to purchase a negro for him.

Parole evidence was offered by the defendant to show that John Muggah the ancestor of the plaintiff, purchased the negro in question as his agent, and with his money; and also for establishing a title to the negro. The plaintiff's counsel objected to the testimony being received to establish *a legal title* in the defendant to the negro in contest; or any farther than to shew that the defendant advanced money to purchase a negro. The court sustained the objection, and a bill of exceptions was taken.

Bowen for plaintiff. The transfer and title to all immoveable property and slaves must be in writing—*La. Code*, 2255—and all extra judicial confessions are inadmissible in every case, where testimonial proof cannot be received.—*La. Code*, 2269.

2. It is admitted that by the Napoleon Code there exists an exception to this rule, when there is a commencement of proof in writing; but no such exception is contained in the Louisiana Code.—*Nap. Code, art.* 1347.

3. In all cases the supreme court have let in parole proof, after a commencement of proof in writing, when the subject matter of the action *did not* relate to the transfer of immoveable property or slaves.—9 *Mar.* 566—12 *do.* 350—3 *Mar. N. S.* 75.—4 *Mar. N. S.* 53.

Simon and *Brownson* for defendants, contended that when a person voluntarily undertook to manage the affairs of another, he incurred all the obligations which results from an express agency, and is brought to complete it. The plaintiff's ancestor purchased this negro as the agent and with defendant's money, and he cannot now claim him.—*La. Code*, 2274, 2255, 1961.—*Pothier contrat du Mandat, No.* 58, 59.—9 *Toulliur*, 236, *No.* 140, 141.

2. Parole testimoney is admissable to show that the plaintiff's ancestor acted as the agent of the defendant in purchasing the negro.—7 *Mar.* 243.

Mathews. J. delivered the opinion of the court.

This is a suit brought by the plaintiff in his own right, and as curator to Edward Muggah, an absentee, to recover from the defendant a slave (described in the petition) belonging to the succession of John Muggah, claiming as heirs to the latter. They obtained judgment for the recovery of the slave, in the court below, from which the defendant appealed.

The evidence of the case shews the legal title to have been vested in John Muggah, during his life-time; and it is not disputed that the plaintiffs are his heirs.

The defendant sets up title to the slave in dispute, as having been purchased for him, and with his funds, through the agency of the deceased Muggah; and that the title, though taken in the name of the latter, legally enured to his benefit. There is no legal evidence to shew that the appellant constituted John Muggah his attorney-in-fact, to purchase for him the identical slave claimed in the present suit, or any other slave; he relies wholly on testimonial proof to establish this fact, and possession of the property, in support of the title by him claimed.

Where a slave is held as having been purchased for the defendant and with his funds, but the title is taken in the name of the person making the purchase, parole testimony is inad-

Our law on the subject of conventional obligations, requires that "every transfer of immoveable property or slaves, must be made in writing:" and no testimonial proof of such sales or transfers can be received, in ordinary cases, except

Western District, *September* 1831

MUGGAH *vs.* GREIG.

that which arises from the confession of the parties to the contract made, under oath, to interrogatories propounded for that purpose.—See *La. Code*, art. 2255 and 2415.

According to article 2961 of the Code, "a power of attorney may be given either by a public act, or by a writing under private signature," &c. It may also be given verbally, but of this testimonial proof is admitted, only, conformably to the title of conventional obligations. In relation to contracts which may be proven by parole, the power granted to enter into them, may well be proven by the same kind of evidence which would suffice when the contract was made directly between the parties. But in the contract of sale, or other transfer of immoveables or slaves, required by law to be made in writing, and which the parties are not permitted to support by testimonial proof, written evidence ought to be produced, as being alone legally admissible to establish the authority by which an agency is assumed for either of the contracting parties.

missible, to prove that the purchaser acted as the agent of the defendant, and bought the slave with his funds.

Written evidence must be produced to prove the agency of another in making a contract of sale or purchase or transfer of immoveables or slaves, which is required by law to be in writing.

So where a person buys a slave and takes the title in his own name, and another person claiming him as having been purchased for him and with his funds, he must shew a written authority to purchase in order to hold or recover the slave.

The record of the present case affords no legal evidence to shew that Greig, the defendant, authorized John Muggah to purchase, for the former, the slave in question; and we are of opinion that the district court did not err, in coming to the conclusion, that the legal title to said slave was in the latter at the time of his death, and that it descended to the plaintiffs, who have a right now to recover the property.

That part of the decree which condemns the plaintiffs to refund the money which was proven to have been advanced by the defendant to their ancestor, is not complained of by the appellee.

This decision has the appearance of contravening the doctrine of mandate, as established in the case of Hale vs. Sprigg, reported in 7 *Martin*, 243. But the opinion of the court in that case, seems to be predicated on full proof of the power granted to the attorney, or on evidence of that fact not excepted to; whereas, in the present case, the whole evi-

dence in support of the appointment of the agent was objected to, and properly rejected.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

ROGERS ET AL vs. HENDSLEY ET AL.

APPEAL FROM THE COURT OF THE FIFTH DISTRICT, THE JUDGE OF THE SEVENTH PRESIDING.

Where an attorney undertakes to collect a debt, and before doing so takes a new obligation *payable to himself*, and gives up the old one to the debtor, the debt thus evidenced by authentic act, made payable to the attorney, cannot be *seized for* and made *subject to his debts*, when it is in evidence the attorney did not intend to appropriate the debt of his principals to himself; and where they assented to the act of the agent and claimed the debt as their own.

Parole evidence is admissible to shew that *an act* or *obligation* taken for a debt by an agent, and made *payable* to himself, is the property and right of his principal, although it appears on the face of the instrument to be due to the agent.

If A receives money for the use of B, it cannot be attached as the property of A in his hands. The same rule applies to notes.

This suit commenced by injunction. The plaintiffs, about the beginning of the year 1829, put sundry notes, debts, and accounts into the hands of Luke Lesassier, an attorney at law, to collect, for their benefit and use. These claims had been transferred to the plaintiffs, to indemnify them on account of a suretyship to William and John Simons. Among the debts placed in Lesassier's hands for collection, was one on Jacob Bogard for $250. It was evidenced by a note payable to William Simons. Bogard, to get further time, agreed with Lesassier, and executed a new obligation by authentic act, in which he acknowledged a mortgage on one hundred acres of land, and stipulated to pay the debt in two equal, annual instalments of $125 each, in the months of March, 1830 and 1831. The new instrument was made payable to L. Lesassier, and bears date in March, 1829. Lesassier left the state for Texas, in the following November, without

Western District, *September* 1831.

RODGERS ET AL *vs.* HENDSLEY & AL

rendering any account of his agency. A new attorney and agent was appointed in the spring of 1830. The debt on Bogard was handed over, with the other claims, by the person having charge of Lesassier's papers, to the new agent, who found this debt evidenced by an act in the notary's office, and *payable to Lesassier alone.* Application was made to the debtor, who recognised and acknowledged the debt to be due, unpaid, and owing to the plaintiffs. That it was so understood between him and Lesassier, at the time of executing the new instrument. The new attorney was proceeding to collect the debt for the plaintiffs, after having made frequent demands of the debtor for nearly a year, when Eleanor Hendsley, a judgment creditor of Lesassier, levied her execution on it, and advertised it for sale as a *debt, right,* and *credit* of Lesassier. The plaintiffs on the 5th of May, 1831, obtained an injunction and arrested the sale.

The district court gave judgment perpetuating the injunction, and decreeing the debt to be the property of the plaintiff. The defendant Hendsley appealed.

Parole evidence was offered to shew the origin of the debt, that it was the same as evidenced by the new obligation, which was, in fact, taken for the benefit of the plaintiffs; that although made *payable* to Lesassier, he never claimed it as his own, or exercised any acts of ownership over it, but always acknowledged it to be the property of the plaintiffs. The testimony was objected to by the defendant Hendsley, and taken, subject to all legal objections.

It was in proof that Lesassier was associated with a partner in his profession, who resided here, and perfectly solvent and able to pay the debt.

Curry for plaintiffs:

Lesassier, the attorney and agent, exceeded his authority in taking the new obligation from the plaintiff's debtor, *payable* to himself, instead of his *principals;* and they are not bound by his acts done out of his authority.—8 *John.* 361.

7 *Martin*, N. S. 244. 2 *Martin*, N. S. 292. 1 *Martin* N. S. 444.

2d. The plaintiffs are no parties to the act between Lesassier and Bogard the debtor, and are consequently not bound by it. They have the right to shew by parole testimony that their agent exceeded his authority, and, also, their *right* to the debt which he has made payable to himself, and that he acknowledged it to belong to the plaintiffs.—11 *Martin*, 630. 7 *Martin*, N. S. 199. 7 *Martin*, 243. 1 *La. Rep.* 220.

Garland, for defendant Hendsley, relied on the following points:

1st. The attorney, by taking a new obligation in his own name, becomes responsible to the principal creditor; but he has a right to enforce payment in his own name, and his receipt will protect the debtor from paying it to the principal creditor.—5 *Martin*, N. S. 41. *La. Code*, art. 2139.

2d. An agent who surrenders a note of his principal, and takes a new obligation payable to himself, novates the debt, and by delaying to sue on it at maturity, becomes responsible for the amount.—4 *Martin*, N. S. 539. *Ibid*, 655.

Porter, J. delivered the opinion of the court.

The plaintiffs placed in the hands of two gentlemen of the bar, who were associated in professional business, a note, for collection. One of them extended the credit given on it, and took a new obligation in his own name. The defendants, who are creditors of this person, levied an execution on the debt which he had thus made payable to himself, and were about selling it. The plaintiffs prevented them from doing so by an injunction. The court, on hearing the parties, made the injunction perpetual, and the defendants appealed.

Where an attorney undertakes to collect a debt, and before doing so takes a new obligation payable to himself, and gives up the old one to the debtor, the debt thus evidenced by authentic act, made payable to the attorney, cannot be seized for and made subject to his debts, when it is in evidence the attor-

We do not feel compelled to examine whether, under a power to two, one can give a discharge; or whether, in the

Western District, *September* 1831.

RODGERS ET AL *vs.* HENDSLEY & AL

hypothesis that he could, an authority was vested in him to novate the debt. Supposing him to possess such power, the evidence in this case clearly establishes that he did not contemplate taking the obligation in his own right, and for his own benefit: it is, on the contrary, proved that at the time he received the obligation, and afterwards, he declared that it was for the use and benefit of his principals. This transaction, which they might have disavowed, they have thought proper to approve; and there can be no doubt that, on their assenting to it, the obligation became theirs, and was not subject to the attorney's debts. We have already decided that if A receive money for the use of B, it cannot be attached as the property of A; and the same rule will, we think, apply where a note is taken. The circumstance of the obligation being in the name of the attorney, does not affect the legal principles which control the case: neither plaintiffs or defendants were parties to the act, and it was open to them to shew, by parole or other evidence, the real nature of the transaction.—4 *Martin's Reports*, N. S. 134.

It is therefore ordered, adjudged, and decreed, that the judgment of the district court be affirmed, with costs.

ney did not intend to appropriate the debt of his principals to himself, and where they assented to the act of the agent and claimed the debt as their own.

Parole evidence is admissible to shew that an act or obligation taken for a debt by an agent, and be made payable to himself, is the property and right of his principal, although it appears on the face of the instrument to be due to the agent.

If A receives money for the use of B it cannot be attached as the property of A in his hands. The same rule applies to notes.

INDEX

OF

PRINCIPAL MATTERS.

PAGE.

ABANDONMENT.

1. If on the vessel being seized the captain be thrown into prison, and on his being released makes immediate claim for her, and is threatened with death if he persist, he cannot be charged with negligence.

Thompson vs Insurance Company 228

2. If the difficulty of recovering the vessel be great, and the prospect of getting her into possession so as to pursue the voyage feeble, an abandonment may take place. *ib.*

ABSCOND.

1. The general received opinion of the words *to abscond*, is the act of a person who leaves any particular place clandestinely, or of one who conceals or hides himself. *Johnson vs Thompson* 410

ADMINISTRATOR.

Letters of administration make full proof of the party's capacity, until they be revoked, they must have their effect, and the regularity of the proceedings on which they issued, cannot be examined collaterally.

Rills vs. Questi, 249

AGENT.

Unskilfulness in an agent is not excused by a contract in which it was stipulated he was to be governed by the directions of the principal.

Nichols vs. Hanse et al. 382

PAGE.

1. Where the bank undertakes the collection of a note, it becomes the agent of the depositor, and if the notary employed to protest the note for non payment, fails to give the legal notice of protest to the endorsees, in consequence of which they are exonorated, the bank is liable for the neglect, and bound to pay the amount of the note to the person depositing it for collection.

Pritchard vs. State Bank, 415

2. But where an agent becomes liable to pay the amount of a note, in consequence of the neglect to give legal notice of protest, he is entitled to have the note, with all the remaining rights of the creditor, transferred to him. 415

4. Where a principal constitutes another person his attorney-in-fact to sell a specific piece of property within a limited time, if a sale is made subsequently, without a prolongation of the time by the owner, it is null and void.

Livingston vs. Coiron, 441

4. But if the principal writes to his attorney-in-fact just before the period of limitation expires, and states it to be his intention and will, that the sale be made at a period later than that specified in the original authority, a sale made subsequently to the time first specified, will be valid, and cannot be rescinded for want of authority in the agent to sell. *ib.*

AMENDMENTS.

1 Amendments are not matters of

PAGE.

course, and cannot be made without leave of the court or consent of the party —if they be, they cannot be noticed.

Trahan vs. McMannus 209

2. Although no answer be put in, a supplemental petition cannot be filed without leave. To supply the deficiencies of a petition is to amend, and no amendment can take place in the pleadings without the leave of the court or the consent of the adverse party.

Baines vs Higgins 220

3. Where an amendment to a petition contains matter of substance, and the cause is tried without an answer to it, it will be remanded for want of the *contestatio lites.*

Allain vs. Preston 391

ATTACHMENT.

1. An attachment will lie against the incorporeal rights and credits of a debtor in the hands of garnishees, although it be sued out after transfer of such rights and credits to a third person, when no notice of such transfer had been previously given to the debtor.

Cox vs White 422

2. The irregularities of such a proceeding by attachment which has progressed to final judgment, cannot be inquired into in a subsequent suit by a new plaintiff, to recover the property attached. The judgment in attachment forms *res judicata* between the parties, and cures all irregularities when not appealed from. *ib.*

3. An attaching creditor has a right to call for proof of the consideration of an assignment which is opposed to him.

Mayor vs. Brown 492

4. Where the proof of that consideration is incomplete he may avail himself of the defect. *ib.*

5. If A receives money for the use of B, it cannot be attached as the property of A in his hands. The same rule applies to notes. *Rodgers vs. Hendsly* 597

ATTORNEY AT LAW.

1. The authority of the attorney is not restricted to the mere prosecution of the suit, but extends to every thing necessary for the protection of the interests intrusted to his care.

Paxon vs Cobb, 137

2. If he dismiss the action it is within the scope of his authority, and the plaintiff is bound by his acts. *ib*

3. Where an attorney undertakes to collect a debt, and before doing so takes a new obligation payable to himself, and gives up the old one to the debtor, the debt thus evidenced by authentic act, made payable to the attorney, cannot be *seized for* and made *subject to his debts,* when it is in evidence the attorney did not intend to appropriate the debt of his principals to himself; and where they assented to the act of the agent and claimed the debt as their own.

Rodgers vs. Hendsly, 597

APPEAL.

1. The appeal bond must exceed by one half the amount of the whole judgment appealed from, to entitle the appellant to a suspensive appeal.

Ross vs. Pargood, 85

2. And by the article 574th of the Code of Practice the judge must in all cases, whether it be a suspensive appeal or merely a *devolutive* appeal, fix the amount of the appeal bond which is the legal sum. *ib.*

3. No appeal lies in behalf of universal legatees from a rule directing the executor to pay into the treasury the balance in his hands.

Goslin's legatees vs. her heirs, 141

4. The supreme court will not remand a cause when it appears that justice has been done.

Balsineur vs. Bills, 151

5. Where the record shews that the testimony was taken down by the clerk no objection can be made to the certificate of the judge that the record contains all the evidence adduced.

Crawford vs. Jewell, 162

6. When nothing to the contrary appears the judge is presumed to have given his certificate on the event occurring which authorized him to give it. *ib.*

7. If the record shew that documents were *produced,* when nothing shews they were *filed,* there is no evidence of a diminution of the record. *ib.*

8. When the supreme court remands a cause on a single point, it remands it also for an inquiry into all the questions which grow out of the discussion on that point.

Brastow vs. Ventris, 172

9. If the appellant fail to bring up the record, and it be brought up by the clerk of the lower court and the appellee cited, he may pray for affirmation of the judgment.

Barbarin vs. Armstrong 208

PAGE.

10. Without a statement of facts the supreme court cannot know what evidence was introduced, and are bound to presume until the contrary is shewn, that the judgment below was rendered under those circumstances, and with that evidence which made it correct and legal.
Flower vs Hagan et al, 225

11. Where the case turns entirely upon a question of fact, the supreme court will not disturb the verdict of the jury.
Green vs. Turner 254

12. When the appeal is taken for delay damages can only be awarded to the party in interest.
Adams vs. Dupy, 259

13. In cases of conflicting testimony, the supreme court will place great reliance upon the conclusion of the court of the first instance. *Irion vs. Love* 261

14. After the appellant has had the cause set down for argument, the appellee cannot make a motion to dismiss it,
O'Donnell vs. Lobdell 299

15. If the appellant does not comply with the condition upon which the appeal has been granted, by giving bond to prosecute the appeal, and suffers a year to elapse, the judgment becomes *res judicata*, and he cannot be relieved either by the district or supreme court.
Marigny vs. Stanley 322

16 Where the judge *a quo* has made a statement of facts, it is not required to shew that any attempt was made to have one made between the parties: the supreme court will presume that the judge has done his duty and did not volunteer in making a statemeut till it was his duty to do so. *Bachemain vs his creditors*, 346

17 Where there is a statement of facts, the cause is examinable in every one of its parts without exception. *ib*

18 Where the verdict of the jury is not manifestly wrong, it will not be disturbed.
Passemont vs Norwood, 389

19 If the damages assessed by a jury appear to be enormous and unsupported by the testimony, the judgment will be reversed *Bourginion vs Bourdousky*, 373

20 When the evidence is not conclusive it will be remanded to be submitted to another jury. *Cline vs Caldwell*, 396

21 In a case where no question of law is raised, the judgment of the court *a quo* will be confirmed, if it appear to be in conformity with the facts of the case.
Halphen vs. Franklin's Curator, 465

22 The supreme court will not proceed to the examination of a cause in which it

PAGE.

is not evident that the whole record is before them. *Sibley vs Field*, 491

23 The supreme court, whilst sitting in the eastern district, during the term prescribed by the constitution, will not transact business arising in the western.
Millaudon vs Lapice, 511

24 The supreme court cannot examine a judgment of the district court unless brought before it by an appeal in the case itself, or when an action of nullity is properly brought and carried up.
Andrews vs Harmon, 587

AVERMENTS.

If the plaintiff does not entitle himself to a privilege by proper averments on the record, it cannot be allowed to him.
S. Dezier vs. Michaud 271

AVERAGE.

1. Every thing which is voluntarily sacrificed for the benefit of all concerned, is considered the subject of general, not particular average.
Teitzman vs. Clamageron 195

2. Masts hanging over the side of a vessel, fall under the head of general average; but they only do so for the value they had at the time they were cut away. *ib*

AUCTION.

1. By the English courts it was considered a breach of faith on the part of the vender, to employ bidders or puffers at auction. If the owner wished to prevent a sale under a certain price, he must proclaim the lowest bid he would take in putting up his goods.
Corryolis vs. Mossy 504

2. The purchaser could avoid a sale at auction, made by the aid of puffers or private bidders, on the ground that his assent had been obtained by fraudulent practices on the part of the vender or his agent. *ib.*

3. A purchase made at auction is similar to a private contract. In both assent is necessary in each party; and an offer to sell at auction, to the highest bidder, is not binding, unless the auctioneer assent to the bid that is made. *ib.*

3. So where property is put up at auction and the plaintiff becomes the highest bidder, the auctioneer may reject his bid and withdraw the property unless he will bid a certain sum more. *ib.*

PAGE.

BACK CONCESSIONS.

1. Where a back concession is authorized to be located in the rear of the ancestor's plantation, and in the life-time of the latter, he and his son locate it in a more advantageous position; at the sale of the ancestor's succession the proces verbal of the sale purports to sell only the inchoate title or right to the concession, the son who purchased through an agent at sale, will be considered as having purchased the located tract which is most advantageous to him, and not the right to locate it in the rear of his ancestor's plantation.

Berard's heirs vs. Berard, 1

2. And on being sued for the price of the purchase according to the proces verbal of sale, he will be deemed to have purchased in error affecting the substance of the thing sold. *ib*

BAIL.

The bail has a right to file an answer and have his case tried by a jury.

Gale vs Quick's bail, 348

BILL OF EXCEPTIONS.

The party who excepts to the opinion of the court must take care that the bill of exceptions contain all the facts necessary to be known in revising the opinion of the inferior court.

Ingraham vs. White, 294

BROKER.

One who receives a note *as a broker* cannot claim any property under it as a creditor of the bailer.

Palmer vs. Haynes & Co. 370

BOND.

1. The causual insertion in a bond of an additional clause or condition not contemplated by the legislature, will not bind the surety.

Boswell vs Lanhart 397

2. If a bond be taken with reference to a particular law, it must be construed by it. *ib.*

BUILDER.

1. Where the contractor for a building is sued for materials furnished, and the owner made party to the suit, the latter is only responsible for the costs incurred after issue joined.

Rabassa vs. Passement 178

2. A proprietor may cancel at pleasure the contract with an undertaker to build, but in the exercise of this right, the use of it must be considered as putting an end to the contract in all its parts and relations, and authorizes a valuation of the expense and labour incurred by the undertaker by other evidence than that of the written contract itself.

Villalobos vs. Mooney 321

3. The amount stipulated in a contract thus avoided, may be correctly used as a means to ascertain the just value of the work performed, but ought not to be considered in exclusion of all other testimony. *Ib*

4. Where architects and undertakers are called upon to estimate the value of work and materials and differ in their opinions, the lowest estimate will be taken. *Ib*

5. Unless there be a contrary stipulation in a contract for building, the materials of an old house removed are, by custom, considered as belonging to the undertaker as an equivalent for his expense and labour in removing them. *Ib*

6. In a contract to build, if the owner consent to a deviation from the original plan, he is liable to the undertaker for such extra work as may be caused by the change.

Fossier vs. Herries 490

CITATION.

1. Although a party may be arrested and held to bail, service of the petition and citation cannot be dispensed with.

Wall vs. Wilson 169

2. Knowledge of the suit on the part of the defendant, no matter how clearly it may be brought home to him, will not suffice if this formality has not been pursued. *Ib*

3. Copies of citation require no seal.

M'Donogh vs. Gorman 310

CITY COUNCIL.

1. The city council have the power to establish markets, and to provide for the cleanliness and salubrity of the city.

Morana vs Mayor 217

2. They have an undoubted right to prevent the violation of any ordinance they may pass in relation to the markets. *ib.*

3. They have the right to confine the sale of oysters to certain designated stands, and to prevent their being sold at any other. *ib*

PAGE.

CERTIFICATE.

Where the certificate is signed by a person who styles himself judge of probates, he will be presumed to be the sole judge of the court. *Dismukes vs Musgrove* 335

CODE OF PRACTICE.

There is a clerical mistake, or typographical error, in that part of the English text of article 575 of the Code of Practice which says the appeal must be taken for "one-half the amount of the judgment," &c. It should read, "*exceeding by one-half* the amount," &c.
Ross vs. Pargoud 85

COMMUNITY.

1. The community of acquets and gains or legal partnership, is so inconsistent with the ordinary commercial partnership that both cannot exist together, and the legal supersedes the commercial.
Squire et al vs. Belden et al 268

2. Whether a commercial partnership can exist between husband and wife even when there is no community of acquits and gains; quere. *ib.*

COMPENSATION.

1. Compensation cannot be pleaded in cases of insolvency, when the claim of the debtor to the insolvent proposed to be compensated, has been acquired by such debtor subsequently to the failure of such insolvent.
Crain vs. Baillo et al 82

2. A claim due from an insolvent debtor to a partnership firm, cannot be allowed in compensation of a debt due by an individual member of the firm to the insolvent. *ib*

3 Payment by a firm will not support a claim in compensation between one partner and the person for whom it was made. *Terran vs. Delastra* 324

4. Where three individuals composed a partnership in a bakery, and two of them, by a written document (before the dissolution of the firm) acknowledged a stated amount due to the third; if this document be transferred by the latter, the transferee cannot plead it in compensation of a debt which he owes to one of the two partners.
Gomez vs. Ramos 426

CONSIGNEE.

1 Where mutual accounts exist between the consignor and consignee, the latter has no lien upon the goods attached in his hands, unless there be proof of a balance in his favor at the time of the attachment. *Russell vs. Buckles* 417

2 A consignee has a privilege for advances made upon goods consigned to him. *Phelps vs Haring et al* 439

CONTINUANCE.

1 If the sheriff returns that a witness is not to be found, the party praying continuance on that account, must shew that he is a resident of the parish, or that he took steps to obtain his deposition.
Saul vs See's Curator, 130

2 Where a continuance is prayed for, owing to the want of a return to the commission which issued seventeen months before, the affidavit should state the causes which led to the failure, and the probable grounds of thereafter obtaining the testimony sought. *Silva vs Lafaye,* 198

3 An affidavit for a continuance, setting forth that the party is informed and believes, is insufficient if it does not contain the name of the informer.
Trahan vs McMannus, 209

4 A cause will not continue without the oath of the party that due dilligence has been used. *Thompson vs Ins. Co.* 228

5 A continuance was properly refused where the party was wanting in the use of legal dilligence. *Adams vs Dupuy,* 259

6 The necessary absence of the counsel from indisposition, or his attendance on public business, entitles the client to a continuance; but he cannot claim this indulgence on the voluntary absence of his counsel in attending another court, especially when another counsel is engaged and attends, and it is not alleged that the one absent is in possession of important papers, which could not be obtained from him. *Ingraham vs White,* 294

7 A continuance was properly denied where the party appeared generally, to have neglected the means of preparing his defence; and under such circumstances, the court did not err in refusing a new trial. *Erwin's Ex. vs Trion,* 305

8 The affidavit necessary for the continuance of a cause may be made by the person who represents the absent party; but where any thing occurs which excites suspicion that the party has absented himself to obtain a greater latitude through the oath of an agent or his attorney than he could have had were he present, the

PAGE

continuance may be properly refused.
Penne vs Tourne, 462

9 The oath of the attorney to facts, the knowledge of which he derives from his client, is sufficient for a continuance. *ib*

CONTRACT.

The master of a steamboat who contracts for repairs, is personally bound:—the parties contracting with him have a double remedy; they may sue him or sue the owners, on a contract made with their agent. *Mead vs Buckner*, 282

COHEIR.

Whatever right one may have against his coheirs, he cannot avail himself of it to avoid paying for property bought at the sale of the estate. *Rills vs Questa*, 249

COSTS.

1 The plaintiff or party who succeeds in a suit, has a right to recover his costs from those against whom he obtains judgment. *Brasseur vs Her Husband*, 590

2 But where there are two sets of defendants, having distinct interests, as far as the judgment operates in each distinct interest or party, each one must pay his proper proportion of the costs accruing in his controversy with the plaintiff. *ib*

CURATOR.

1 Complaints as to the conduct of a curator can only be redressed when *as curator* he presents his account. Particular acts of the representatives of estates cannot be singled out by individual creditors, and made the basis of a suit.
Watts vs McMicken, 182

2 A stranger, litigant in our courts, cannot have the benefit of their process and at the same time refuse obedience to their orders: so a curator, who has gone abroad, cannot obtain the aid of the court of probates for the delivery of the papers of the estate while he refuses to comply with an order to account.
State vs. Pitot, 266

3 A curator must settle his accounts with the court of probates, or annex them to his answer and file his vouchers, in order to support the plea of fully administered. *ib*

4 A curator *ad hoc* is intended by law as a protector to the interests of the absentee, and should be considered as principally beneficial to the defendant, and consequently, the plaintiff in such a case, is not bound to pay for services rendered by the curator. *Pontalba vs Pontalba* 466

DEMAND.

1 A demand of payment must be made at the place designated if it exist; if it does not, the plaintiff will recover without. *Erwin vs Adams*, 318

2 Demand of payment at a place designated by the note, is a condition precedent to a recovery on it.
Smith vs Robinson, 405

DEPOSITE.

The act of the creditor in withdrawing the deposite made by the debtor, of the amount which he believes to be due, is not conclusive that nothing more is owing. *Forsyth vs Lacoste*, 319

DONATION.

1 A donation of immovable property may be made, and stand good against creditors, where the father put his daughter and her husband in possession of land, which was afterwards sold and the price received by the husband of the daughter, and the sale ratified by the father.
Chachere vs Dumartrait, 38

2 In this case the price of the land sold, will be considered as due to the father, but received by the son-in-law as a donation or marriage portion due to the daughter, which is as completely effected as if delivered from the father to the daughter. *ib*

3 A donation under the form of an onerous contract is not void.
Trahan vs McMannus. 209

4 A donation disguised under the form of a stipulation, *pour auturi*, is revocable by the donor until accepted; and there are no exceptions in favor of minors.
Dismukes vs Musgrove; 335

5 A donation *propter nuptias* cannot be made to the prejudice of creditors.
Mercer vs Andrews, 538

DEBTOR AND CREDITOR

In Solido.

A creditor of several debtors *in solido*, who has received a dividend from the estate of one of them, can only claim from the estate of the others, the amount due, after deducting the payment made:

PAGE.

and though he may have proved his debt against each estate for the whole amount, if he subsequently receives a portion of it, from the estate of one of the debtors, his rights on the estates of the others are estimated in relation to the balance due, after deducting that payment, not by the amount of the original debt.
Armor vs his creditors, 376

ERROR.

1 In a suit for the price of a tract of land sold, the defendant may successfully resist payment on account of error falling on the substance of the thing sold
Berard's heirs vs. Berard, 1

2 A party is entitled to recover when he has paid in error. *Legon vs Nav. Co.* 128

EVICTION.

The owner who procures the eviction has a right to select whether he will pay the value of the materials and the price of the workmanship, or a sum equal to the enhanced value of the soil.
Boatner vs Ventris, 172

EVIDENCE.

1 Where it is shewn the attorney acknowledged the receipt of half the amount of a claim, by receiving a note from the party payable in bank, and dismisses the suit instituted against another of the debtors under this claim, for the balance, on the suggestion that the claim is settled, and the presumption is, that he has collected the whole debt, and is accountable to the plaintiff for it, unless this presumption is destroyed by contrary proof.
Hagan et al vs. Brent, 26

2 Parole testimony is inadmissible to shew that another person was to have signed a surety bond in addition, when the bond itself does not shew the facts, or admit such an inference.
Police Jury vs Have et al. 42

3 In a suit between the endorsee, who is the holder and the drawer and endorser of a bill of exchange, the consideration may be impeached; and the question, whether the drawer ever received consideration or payment therefor? inquired into. *Booker vs Lastrapes*, 52

4 And where from the evidence, it appears doubtful, whether the drawer of the bill has received the value or any consideration therefor, the case will be remanded for a new trial *ib*

5 An instrument of writing under private signature, and not proved by the subscribing witness, is still admissible as evidence of title, where it had been four years subsequent to its date recognized by authentic act; but it will only take effect from the latter date, without proof being made of the original deed.
Scott vs Calvit et al. 69

6 Parole testimony is admissible to prove the sale and transfer of a note payable to order, without endorsement or written transfer
Hughes vs Harrison et al. 90

7 One of the payees of a promissory note, who together with the other have sold or exchanged it without recourse on them, is a competent witness to prove the consideration for which the note was given. *ib*

8 The proceedings on the cession of the plaintiff's debtors are the best evidence to shew his insolvency, and are admissible as proof when judgment rendered on them is not even signed
Pargoud vs. Morgan, 100

9 The record of a judgment against the agent, is legal, though not conclusive evidence, of the settlement of a debt due to the principal. *ib*

10 The jury may correctly infer from the relation between the principal and agent, (they being brothers) and the long silence of the former, that the settlement was made with his consent, or was afterwards approved: in this instance, however, the cause was remanded
Kemper vs Turner, 149

11 Parole evidence of the *lex non scripta* of a foreign country must be received without the party offering it being required to show that there is no statute law on the subject. *Newsom vs Adams*, 153

12 The extension of a lease may be proved by parole, and the lessee is a competent witness for this purpose if he be disinterested by a release. *Mossy v Mead*, 157

13 It is not sufficient ground to reject a witness that another has or may contradict him *Thomas vs Thomas*, 166

14 The existence, loss, and contents of a will may be proved by parole testimony

15 A policy of insurance is good evidence to shew the fact of the vessel having been insured, but furnishes no proof as to her value. *Silva vs Lafaye*, 198

16 A receipt, of a date posterior to the *contestatio litis*, is no evidence of the existence of the facts alleged by the pleadings against either of the parties to the suit. *Baines vs Higgins*, 220

17 Evidence that a document had been

PAGE.

seen among the papers of a deceased person, searched for and could not be found, and that some of his papers were lost, is not sufficient to enable the party to give parole proof of its contents.

18 A plaintiffs warrantor is an inadmissible witness in support of the plaintiffs title. 220 *ib*

19 It behooves the plaintiff in a possessory action, to shew that he possessed as owner, or that as *usu fructuary*, he was entitled to the use, or had a real right growing from such real estate or slaves. *Preston vs Zabrisky*, 226

20 Testimony should be weighed by probabilities, and its truth be rather ascertained in this manner than by counting the witnesses. *Kemp vs Wamack*, 272

21 Where the evidence is contradictory, but preponderates in favor of the party for whom the jury find, the supreme court will not interfere with their verdict. *Mead vs Buckner*, 282

22 Erasures or interlineations in the substantial part of an instrument, are presumed to be false or forged, and must be satisfactorily accounted for before the instrument can be received in evidence *McMicken vs Beauchamp*, 290

23 A vender of the right of mortgage, who warrants only the existence of his claim, cannot be objected to on the score of interest, to prove possession in his vendee *Orillon vs Nerault*, 292

24 Parole evidence may be given of the existence of articles of partnership, but not of their contents. *Ingraham vs White*, 294

25 A record ought not to be rejected because different parts of it may have been obtained from the clerk at different times, where the certificate shews that the record of the whole proceedings is complete *Dismukes vs Musgrove*, 335

26 In a suit upon a note, the plaintiff is not bound to prove the defendant's signature unless it be expressly denied; but if neither the allegations in the petition, nor interrogatories annexed thereto, require such denial or admission, then every means of defence is open to the defendant under the plea of the general issue *Bennet vs Allison*, 419

27 The purchaser of slaves who has given his note in payment, cannot prove a condition different from that expressed in the deed of conveyance *Goodloe vs Hart*, 446

28 Nor can he prove by parole, that a condition was added by consent of parties after the conveyance was executed.

29 A party is excluded from being a witness on the ground of interest, and when that interest ceases, the objection is removed *ib*

30 Though a witness may, from the face of the record, appear *prima facie* interested, he should not be rejected without enabling him to explain his situation, by being questioned on his *voir dire*. *Spencer's Syndics* vs *Lee et al.* 472

31 The declarations of the plaintiffs agent are not legal testimony against the defendant, and should be rejected by the court *ib*

32 Where a witness was permitted to testify to the contents of an account book, and after judgment, the party moves for a new trial on the ground that he has discovered where the book is, but does not state that if produced it would contradict the statement of the witness, the new trial will be refused. *Pelayvin vs. Maurin*, 480

33 The executor cannot prove that a receipt of the plaintiff for payments made by the deceased, as attorney for the defendants, embraced a larger sum than was actually paid—this would be proving a negative. Nor can he support his testimony by an account between plaintiff and the deceased; for the defendants are no party to it. *Baudin vs. Conway*, 512

34 When a stipulation is made, prolonging payment, on condition that the debtor pays interest annually; the latter must shew a performance of the condition on his part, to entitle him to its benefit. *Borel vs. Fuselier*, 567

35 If the defendant relies on the performance of certain conditions which entitle him to an extension of credit, he must shew by proof, a performance—the plaintiff is not required to shew a non-performance. *Ib*

36 The allegation that interest was not paid is a negative assertion, which according to the rules of evidence, throws the proof on the adversary. *Ib*

37 Where a slave is claimed and held as having been purchased for the defendant and with his funds, but the title is taken in the name of the person making the purchase, parole testimony is inadmissable, to prove that the purchaser acted as the agent of the defendant, and bought the slave with his funds. *Muggah vs. Greig*, 593

38 Written evidence must be produced

PAGE.

to prove the agency of another, in making a contract of sale or purchase or transfer of immoveables or slaves, which is required by law to be in writing. *Ib*

39 So where a person buys a slave and takes the title in his own name, and another person claiming him as having been purchased for him and with his funds, he must shew a written authority to purchase, in order to hold or recover the slave. *Ib*

40 Parole evidence is admissible to shew that an act or obligation taken for a debt by an agent, and made payable to himself, is the property and right of his principal, although it appears on the face of the instrument to be due to the agent.
Rogers vs. Hendsley, 597

EXECUTION.

1 Nothing in our jurisdiction authorizes two executions issuing at the same same on one judgment, whatever be the number of persons against whom a joint recovery is had, and though they reside in different parishes.
Hudson vs *Dangerfield et al.* 63

2 Where two executions issue, one after the other, on the same judgment, although to different parishes, the second is irregular, but nothing ought to prevent the execution of the first one. *ib*

3 If two executions issue simultaneously on the same judgment, and one of them acted on, the other may be enjoined if attempted to be enforced also. *ib*

4 An executor who presents his account and prays for a discharge, must cause the heirs to be cited.
Marchand vs *Garcie*, 147

5 A sheriff or marshal is no further the agent of a plaintiff in execution, than that which is derived from the writ placed in his hands; the instant it is returned into court, or the return day expires, the authority of the officer to enforce the judgment or receive the money in discharge of it, also expires, unless he has previously made a levy, in which case the law permits him to sell the goods seized. *Rothschild et al* vs *Ramsay*, 277

6 The act of the legislative council of the territory of Orleans, declaring that the personal property of a person against whom a *fi. fa.* shall have been directed, is bound by the delivery of the writ to the sheriff, was not changed until the adoption of the Code of Practice.
Bradbury et al. vs. *Morgan et al.* 476

PAGE.

EXCHANGE.

If A receive from B a slave at a stipulated price, to be paid for out of the proceeds of the sale of the slave of A delivered to B at the same time, it is a contract of exchange, although the title be passed in the form of a sale.
Ails vs *Bowman*, 251

EXECUTOR.

A person who signs a draft as executor is liable in his private capacity, and if he be sued as executor and there be a prayer for general relief, judgment may be given against him individually, if it appear that his liability, as such, was sought to be established. *Russell et al* vs. *Cash.* 185

FEES OF OFFICE.

1 Clerks of courts have the exclusive right of copying, or causing to be copied, the documents of which they are authorized to issue copies. They are answerable for the due and timely issuing of these copies, and for their correctness and fidelity; and the parties have not the right to perform services which the law imposes upon clerks, and thus to deprive these officers from any part of the compensation which the law has provided for them.

2 The clerk has a right to charge for the copies although he use those furnished by the plaintiff.

3 Copies of papers coming from a clerk's office must be official. He must certify that they are true copies, and may charge for the certificates, but not for affixing seals to them.

4 Judgments of nonsuit are considered as final in the cause; and whether they be entered in one or more entries, the clerk has a right to charge against each defendant.

6 The costs may be taxed although not required by either of the parties.

6 The clerk cannot charge for recording citations, and for certifying the recording of petitions, answers and citations. *Gorman vs. M'Donough*, 310

FORFEITURE.

The introduction into Mexico of prohited articles produces their forfeiture, but no penalty is inflicted on the vessel which carries them. *Thompson* v *In. Co*, 228

PAGE.

FRAUD.

1 A sale of property by a debtor who has not sufficient to pay all his debts, made to one set of creditors, will be considered in fraud of the rights of the remaining creditors, and will be annulled and set aside, though made in ignorance on the part of the vendees, as to approaching insolvency, and in all other respects executed with the utmost good faith. *Taylor et al* vs *Knox*, 16

2 Questions of fraud partake of both law and fact, of acts done, and their want of conformity to morality and established law, prescribing the rules by which property is held.
McLaughlin vs *Richardson*, 78

3 A sale which is merely fictitious, the fraud and nullity may be only relative, and such sale might be good as a donation, or only void as to previous creditors. *ib*

4 But when a sale is made with the avowed intention to defraud, the act is so contaminating and immoral, that it entirely vitiates the contract and renders it null and void to all intents and purposes. *ib*

5 The charge of fraud cannot be supported by alleging the neglect of the officer who sold, in complying with any of the informalities required by law, unless it be shewn that the party charged was cognizant of his noncompliance, or knowingly availed himself of it.
Dellee vs *Watkins*, 306

6 The execution being unauthorized by the judgment, could confer no title on the creditor by whom this irregularity was committed. 544

FRUITS.

Evidence must be received of the value of the fruits from the period when the possessor is ascertained to be in bad faith. *Boatner* vs *Ventris*, 172

HEIR.

1 The heir may institute suits before he accepts or rejects the succession.
O'Donald vs. Lobdell, 209

2 If a defendant deny that he s heir, he cannot be made liable until it be shewn that he accepted the inheritance, although by the will, he be appointed executor and residuary legatee. *Cotton vs. Cullen*, 371

HUSBAND AND WIFE.

1 In all cases when the husband and wife are not separated from bed and board, in law the domicil of the wife is to be considered as that of her husband, and service of citation is good as to the wife, when left at the domicil of the husband, although she resides in a different parish, when they are sued jointly.
Dugat vs. *Markham et al*, 29

2 But although the husband must in all cases, unless he refuses, and then the judge authorize the wife to sue and be sued, yet the husband has no right to appear and file an answer for the wife without her consent, where she lives separately in property, and is sued jointly with her husband. *Ib*

3 The construction and effect of an act of voluntary separation and of a division of property between husband and wife, made in 1825, before the adoption of either of the civil codes, must be determined by the laws of Spain.
Labbe's heirs vs. Abat, 554

4 According to these laws the husband and wife were considered so far separate persons, that they could validly enter into any onerous contract—a sale being the example given to illustrate this doctrine. *Ib*

5 The husband and wife were prohibited from making donations to each other during marriage, of property actually in possession; but the wife might renounce her right to the aquets at any time before, during and after the dissolution of marriage. *ib*

6 A contract in which husband and wife mutually agree to separate, divide, and each take a specific portion of the community property, and renounce all right and claim to the community of acquets and gains, partakes strongly of the nature of a contract of exchange, by which each of the parties gives up all claim to the whole, in consideration of obtaining a distinct right and title to a part of the matrimonial community property. *ib*

7 Such a separation and division was strictly speaking a partition of common property and cannot be assimilated to a donation. *ib*

8 The contract of exchange, in 1805, between the husband and wife operated as a good and valid separation of goods between the contracting parties and a dissolution of the community previously existing between them, and a renunciation of the acquets and gains subsequently acquired. *ib*

9 The voluntary separation of husband and wife, did not produce a legal separation *a menso et thoro*. The husband

PAGE.

would still be bound to provide for her maintenance. *ib*

10 The circumstance of the husband having an adulterous intercourse with his mulatto slave in the common dwelling, may have induced the wife, the more willingly to abandon his bed; but is not such an act of legal constraint and coercion on her, or of immorality in him, as to render the contract of exchange, and dissolution of the community of property, null and void. *ib*

11 If the wife makes a concealed donation by acknowledging subsequently to the marriage, that her husband brought in twenty-five hundred dollars when in fact it was owned by her at the time, such donation by the Spanish laws is only revocable during the life time of the doner, and at her instance. *ib*

IMPROVEMENTS.

1 A party evicted by a superior title, and who does not claim of the successful claimants the value of the improvements they have put on the land, cannot recover of a subsequent purchaser of the claimant the value of such improvements.

Harrison et al vs *Faulk et al.* 92

2 There is no privity of contract between the parties, after the lands have passed into the hands of subsequent purchasers; and the party evicted has no lien or tacit mortgage on the land for the remuneration of expenditures for the amelioration or value of the improvements put on the land. *ib*

INDORSER.

The holder of a negociable note by blank endorsement, may maintain suit on it without filling up the same to himself.

Griffon vs *Jacobs*, 192

INSURANCE.

1 When a vessel sails under charter-party, the owners have an insurable interest in freight. *Hodson* vs *In. Co.* 341

2 The failure of the insured to communicate to the assurers the knowledge of the fact, that the vessel was under charter-party, is not such a concealment as will annul the policy. *ib*

3 The knowledge or information material for the insurer to know, and necessary to be communicated to him when the contract is made, is a question of fact, and the materiality of the information is to be determined under a consideration of all the circumstances which belong to the case. *ib*

4 If a vessel be insured for six months trading between New Orleans and any port in the West Indies, United States or Gulf of Mexico, except Rio Grande, or Brassos of St. Jago, the port of New-Orleans is made one of the *termini*, and a voyage between a port in the West Indies and the United States, is not within the policy. *Lippincott* vs *In. Co.* 399

5 The terms of a policy of insurance, "free from average unless general," are convertible with those of "total loss;" and to enable the assured to recover, there must be a total destruction of value — Whether a total physical destruction?— Quere. *Arrandezmendi* vs *In. Co.* 432

6 The preservation of the thing insured up to the time of its arrival at an intermediate port and sale there, produces the same effect as a sale at the *terminus*, unless it be shewn the cargo could not be carried there without a total loss being the inevitable consequence. *ib*

7 Where the insured, by the terms of the policy, take on themselves all risks, excepting a total loss of the thing insured, a partial destruction of the object at an intermediate port, does not discharge the warranty. *ib*

8 The circumstance of the ship being a general one makes no difference in cases of this kind. *ib*

8 Where a house is insured the back-buildings will be considered as accessaries to the main building, and embraced by the policy. *Workman* vs *In. Co.* 507

INSOLVENT.

1. The decree of the Supreme Court remanding a suit against a firm, one of whom is insolvent, virtually cumulates the suit with the other proceedings *in concurso*. *Warfield* vs. *His Creditors*, 188

2 The losses sustained by an insolvent must be shewn by the affidavit of two witnesses. *Sheppard* vs *His Creditors*, 315

3 One creditor cannot be called before a notary to deliberate on his or the insolvent's affairs—meetings of creditors take place in order that the minority may be compelled to abide by the decision of the majority in sums or claims, and where there are less than three creditors there cannot be a majority. *ib*

4 If an insolvent has a right to cede his goods to an only creditor, he ought to have him cited into court. Less than

PAGE,

three creditors cannot form a *concurso*, for there is no minority to be coerced. *ib*

5. The syndic of an insolvent cannot, on a mere motion, be made liable *de bonis proprius*.

Bachemain vs. *His Creditors*, 346

6 By the laws of Louisiana, where an insolvent debtor makes a cession of his goods to his creditors and they accept it, there is a transfer of the property; and a judgment obtained in the court of the U. States, posterior to that transfer, cannot affect the property ceded. The State has a right to regulate property within her limits, and to say how, when, and on what conditions it shall cease to belong to one person and be transferred to another.

Schroeders' Syndic vs. *Nicholson*, 350

7 The deliberations of creditors need not be homologated. *ib*

8 The charge of fraud against an insolvent must be made on the written depositions of a creditor, stating specially the acts of fraud. *Gouy* vs. *His Creditors*, 357

9 If the creditors refuse a discharge, the judge cannot grant one. *ib*

10 Where one of the joint obligors of a note given by a particular partnership fails, and places the payee as a creditor on his *bilan* for the whole amount, he is nevertheless liable but for half.

Bennett vs. *Allison*, 419

11 If an insolvent debtor, in actual custody, applies for the benefit of the insolvent laws, makes a cession of his property, which is not accepted by his creditors who do not attend, and the sheriff is appointed syndic by the court, to receive the cession, the debtor is thereby discharged from his confinement in the same manner as if the creditors had attended and accepted the surrender.

Caldwell vs. *Bloomfield*, 503

12 Where creditors are cited at the instance of an insolvent debtor in actual custody, to attend before a notary and receive a surrender of his property, and fail to attend, or make opposition to the homologation of the proceedings within ten days after they are returned into court, they have the authority of *res judicata*, and cannot be disregarded by the creditors. *ib*

13 A surrender of property by an insolvent debtor in confinement operates a discharge of his person from imprisonment, when not opposed, and there is no breach of the conditions of the bond, occasioned thereby, which will make the obliger and his securities responsible to the plaintiff in execution. *ib*

INNKEEPER.

PAGE.

Where a person permits another who is living about his house, and sometimes doing business for him, to have access to his bar and drink his glasses without charge, in a subsequent settlement of the accounts between the parties, the innkeeper will not be permitted to make out an account for his bar bill;but such an account will be considered an after thought and be disallowed. *Grig* vs *Hathern*, 57

ILLICIT TRADE.

Illicit trade is that which is made unlawful by the laws of the country where it is to be carried to. That trade which the officers of the government may choose to designate as illegal, to suit their purposes,cannot be recognized as such by the tribunals of other countries.

Thompson vs Insurance Co. 228

INTEREST.

1 Legal interest on sums discounted in bank, is the rate of interest established by their charters. The *maximum of interest* on notes payable more than four months after date, at the Bank of Louisiana, is nine per centum, which is the legal interest to be allowed on such judgments in their favor.

Bank of Louisiana vs *Sterling*, 60

2 Interest given by a judgment, forms a part of it, and must be calculated in and secured in the appeal bond, which together forms the judgment of the court appealed from. *Ross* vs *Pargoud*, 85

3 Interest cannot be allowed on a judgment given for the balance of an account between the parties, where payments have been made for costs, and on other accounts. *Baudin* vs *Conway*, 512

4 An action of interest cannot be maintained apart from the principal.

Harty vs Harty, 518

6 Interest will not be allowed on a verdict finding a special sum in damages: and if the judgment gives interest, even from the signing it, it will be reversed.

Trimble vs Moore, 577

INTERROGATORIES.

1 A plaintiff who is interrogated may write his answers on one piece of paper and his oath on the other.

Roy vs *Wiley*, 315

2 The defendant's answers to interro-

PAGE.

gatories will not avail against the testimony of two credible witnesses.
Bourgeois vs. *Bourg* 537

3 When interrogatories are propounded to the plaintiff to be answered in open court, and no day moved for and fixed by the court on which to answer, the plaintiff's neglect to answer will not authorize the interrogatories to be taken for confessed. *Stewart vs Carlin et al.* 12

4 When the defendant annexes interrogatories to his answer and prays that "the plaintiff may be ruled to answer them in open court;" he must, according to the provisions of the 351st article of the Code of Practice, move the court to appoint a day for the plaintiff to appear and answer; and not having done so, he will be considered as having waived his right and dispensed the plaintiff from the obligation of answering. *ib*

5 Where an order to take depositions has been made at a previous term, and the plaintiff at whose instance it was made, takes out a commission in pursuance of it, and submits his interrogatories to which cross ones are filed, it is sufficient to entitle them to be read in evidence, although the usual affidavit has not been made and annexed. *Rife vs Henson*, 96

6 The plaintiff may interrogate the defendant as to the truth of the facts alleged in the petition; but the latter may except to an interrogatory which from a blank being left therein, or other circumstances, is rendered unintelligible.
Perron vs Grassier, 152

7 The Code requires the magistrate to draw a process verbal of the taking of the depositions, annex the same to the commission and interrogatories, if there be any, and seal the same with his private seal. *Ingraham vs White*, 294

INVENTORY.

When an inventory of the property of the wife is made before marriage, expressly stipulating that the property or goods brought into marriage, are to be considered as the *biens propres* of the wife, such property will be considered as *paraphernal* and not dotal.
Gilbeau's Heirs vs. Cornier, 6

INTERVENTION.

If pending a suit the plaintiff sells his title, or the property in contest to another, the purchaser may intervene and become a party to the action.
Marigny et al. vs Nivet et al 498

INSTRUMENTS,

Construction of.

1 The intention both of the obligor and obligee must be sought for in the true meaning and spirit under which the agreement was made, as expressed in the written instrument. *Workman* vs *In. Co.* 507

2 In the construction of every instrument the ordinary and legal meaning of words must be taken into consideration. *ib*

The common and ordinary acceptation of the word house, embraces every thing appurtenant and accessary to the main building; so in legal acceptation, the sale of a house carries along with it whatever may be necessary to a full and complete enjoyment of the thing sold. *ib*

INJUNCTION.

1 It is not enough to shew mere irregularity to obtain an injunction. Injury to the applicant, or apprehension of it, alone can authorize a resort to this extraordinary remedy for relief.
Hudson vs Dangerfield et al, 63

2 Relief by injunction is an equitable remedy, and those who seek equity must do equity. 63

3 An injunction will not be dissolved even if ever so irregularly obtained, if it appears from the circumstance of the case, the party, by an immediate application, would be entitled to a new one. *ib*

4 In taking an injunction bond the officer acts under an authority of law, and inserts the name of the obligees without their consent, so that where one is properly inserted, and another unnessarily, the bond will be valid as to the right one, and the other nugatory.
Pargoud vs. Morgan, 100

5 In assessing damages on an injunction bond, the jury may very properly allow the plaintiff for his reasonable costs and trouble in obtaining a dissolution of the injunction in which the bond was taken. *ib*

6 The plaintiff against whom an injunction has been obtained, may compel the defendant to prove, in a summary manner before the judge, the facts alleged in his opposition; and the proper mode of proceeding is by serving a rule on the defendant to shew cause, why his injunction should not be dissolved: upon a proper shewing, the rule will be continued to procure the necessary proof required by the seizing creditor.
Forsyth vs Lacoste, 319

PAGE.

JUDGMENT.

1 No matter can be urged to delay the execution of a judgment which might have been presented on a trial of the cause. *McMicken vs Millaudon*, 180

2 The judgment cannot include interest if none be given by the verdict, but such an error furnishes no grounds for an injunction, nor is it a cause of nullity. *ib*

3 A judgment rendered by a Spanish tribunal before the cession, bears interest from the judicial demand. *Baudin vs Pollock's Curator*, 184

JUDGMENT BY DEFAULT.

1 Where no answer has been filed, a judgment by default must be taken before any final judgment can be rendered, and if final judgment be rendered without this formality, it carries with it a vice or a defect for which it may be annulled. *Dugal vs Markham et al.* 29

JUROR.

1 The act of 1825, declaring it not to be good cause of challenge to a juror, that he was a member of the corporation that was a party to the cause, is not repealed by the provisions of the Code of Practice. *Mayor vs Ripley*, 344

2 A trial by jury cannot be refused on the ground that the suit commenced by motion instead of petition. *Gale vs Quick's bail*, 348

JURISDICTION.

1 When a plaintiff brings suit in the Court of Probates to recover property which is claimed by the defendant under a will, it will be dismissed for want of jurisdiction, as involving a question of titles to property, which the Probate Court cannot try. *Sharp vs Knox*, 23

2 The Court of ordinary jurisdiction, *i. e.* the District Court, can alone try questions of title, and a suit involving the right to property, claimed under a will and confirmatory act, must be brought in this Court. *ib*

4 The law empowering a judge of the late Superior Court of the territorial government, to appoint curators to minors, &c., and grant letters of curatorship to probate judges is repealed, and that authority vested in a justice of the peace. *Humphries vs King*, 49

4 A court is not ousted of its jurisdiction in consequence of the sole judge of it, being interested in a suit as being personally incapacitated. *ib*

5 If a probate judge is a curator, his court is the proper and exclusive jurisdiction to compel him to account, although from personal interest he cannot sit; yet there is no other jurisdiction to try the case, which is a *casus omissus*, that the judiciary cannot supply. *ib*

6 A suit against an executor for property sold by him contrary to law, is not a suit against the estate, but against him in his own right, and therefore, cannot be brought in the court of probates. *Bouquette's Guardian vs Donet*, 193

7. A marshal of the United States District Court, in his official capacity, is not, perhaps, amenable to a state court, and as such, cannot be controlled by it; but if in that capacity he wrongs a citizen of the state, he is individually answerable, and in her courts. *Bauduc's Syndic vs Nicholson*, 200

8 If the petition charges the defendant with having acted under a pretended admiralty process, a plea to the jurisdiction of the court takes the fact for granted, that the process was a pretended one, and the plea is no answer to the petition. *ib*

9 Pleading to the merits is only one way of giving jurisdiction to the court. Issue joined on any other matter, unless where the incompetency of the judge is absolute, will have the same effect. *Flower* v *Hagan et al.* 225

10 Claims against an executor for the payment of the testator's debts, are exclusively cognizable before the court of probates where the succession is opened. *Smith vs Wilson*, 227

11 The court of probates has exclusive jurisdiction to decide on claims for money which are brought against successions administered by testamentary executors. *ib*

12 On the division of a parish, the former court of probates retains its jurisdiction of succession theretofore opened. *Patoulett vs Patoulett*, 270

13 It is the sum claimed, and not that recovered, which gives jurisdiction. *Lewis vs Clark*, 438

LAND.

It does not follow that because the title is confirmed in the name of a third person, that the right, title, and interest, to the land covered by it, may not be in the name of the person by whom it is claimed. *Kemp vs Kemp*, 24

PAGE

LEASE.

1 If a lessee holds over without the opposition of the lessor, after the expiration of the lease, there is a tacit reconduction which binds him to pay the rent, and entitles him to hold the premises.
Mossy vs Mead 157

2 Although a lease is cancelled, if the lessee remains in possession he is liable for the rent, on a tacit reconduction, in the same manner as if he had held over, after the lapse of the time for which he had obtained the lease. *Foucher* v *Leeds*, 405

3 Judgment can only be given for the rent due at its date. *ib*

4 In an action for rent, the plaintiff will recover without adducing title, if he shew a continued possession.
Paulding vs Dowell, 452

LEGATEE

The universal legatee, who after taking possession of the estate, and paying the debts of it, is credited by two thirds of the succession, only loses one third of the debts due to him, or by him paid. The confusion which existed while he represented the whole estate, ceases with the eviction of part of it. *Hodder* v *Nelder*, 525

MANDAMUS.

1 The article 790 of the Code of Practice does not embrace the issuing a mandamus to compel an auctioneer to do his duty, it only applies to cases which have a tendency to aid the jurisdiction of the supreme court, which is appellee only.
Winn vs Scott, 88

2 Whether the writ of mandamus can be used for the purpose of enforcing the payment of a sum of money? Quere.
Louisiana College vs Treasurer, 394

3 Writs of mandamus never issue to officers charged with a public duty, to do any act, where the law vests them with a discretionary power. *ib*

MANDATE.

1 A joint authority cannot be exercised by a part of those to whom it is delegated, even after the death of one of them. *Sample et al vs Lamb's curator*, 275

2 One who exceeds the limits of his mandate, has no claim for indemnification 528

MINORS.

1 The under-tutor is the proper person to maintain an action for the recovery of minors property which was sold to satisfy the debts of the mother.
Chisolm vs Skillman, 142

2 The minor who has reached the age of majority during the pending of the action, may make himself a party, but the mother cannot supply the place of the under-tutor. *ib*

3 The sale of minors property, or that of a succession, where the heirs are absent, must pursue the forms of law directed for its alienation, or the sale must be annulled. *Elliot vs Labarre*, 326

4 The authority of the judge of probates is necessary to enable the register of wills to sell. The latter is merely a ministerial officer, and can make no disposition of the property of a succession unless under the direction of the judge, to whom the law entrusts it control. *ib*

5 The minor who attempts to recover from his tutor the price of an immoveable, which the latter has sold, cannot, in case he fails to obtain the whole price, sue the purchaser for the object in his possession. *Harty vs Harty*, 518

6 Where the tutrix acquires property contrary to law, she is a possessor in bad faith, and responsible for the rents and profits. *ib*

7 When minors come of age they may confirm irregular alienations of their property and demand the price, or they may disavow them and claim the thing and its fruits; but they cannot do both. *ib*

8 Minors cannot claim interest on the value of property which remains unsold, or which they state was sold illegally. *ib*

9 Every settlement between the tutor and the minor arrived at the age of majority is void, which is not preceded by an account and delivery of vouchers, ten days before the receipt is signed; and these facts must appear by the receipt. *ib*

10 Revenue due from the time of emancipation, is due from the time the minors are emancipated by marriage; but binding one of them as an apprentice does not emancipate him. *ib*

11 If minors property has been sold contrary to law, their mortgage will take precedence of the liens which the purchasers may have subjected it to in their hands. 524

12 The consent or approbation of the family meeting is not required to enable the tutor to furnish security in lieu of the general mortgage: their duty is confined to estimating the value of the objects presented for special mortgage, and until their decision no change can be made

PAGE.

in the security of the minor.
State vs. Pitot, 534

13 So long as there is a possibility of obtaining a decision from those to whom the law has given the preference in deciding on the affairs of minors, the court cannot entertain the question of submitting their interest to the decision of others *ib*

MORTGAGE.

1 No legal mortgage exists in behalf of the state, or the parish, or the property of its collecting officers, since the adoption of the Louisiana Code in 1825.
Police Jury vs Hawe et al. 42

2 The city has no right of mortgage on the property of individuals in consequence of their becoming securities for the city treasurer. *Blache et al* v *Mayor* 482

3 The syndics of an insolvent cannot release a mortgage existing on property sold by the insolvent previous to his failure, even to disencumber the property so as to receive the price from the purchaser: their powers only extend to the discharge of existing liens on property surrendered by the insolvents.
Dorfeules vs Duplissis, 484

4 Where syndics release a mortgage existing on property sold before the surrender by the insolvent, receive the price and place it on the tableau to the credit of the mortgage creditors, who are minors, but represented by their under-tutor, they still have their recourse on the mortgage property, because they were not cognizant to the fact of the mortgage being released. *ib*

5 The recorder of mortgages is forbidden to refuse or delay the recording of any instrument, importing or stipulating a privilege or mortgage, presented to him for that purpose; but must do it in the order of time, and without leaving any blank space between the acts as presented
Florence vs Mercier, 487

6 The builders and material men's privilege must be recorded in the office of the recorder of mortgages, to have effect against third persons. *ib*

7 The recorder of mortgages is liable in damages to the party aggrieved, for omitting to record, and cannot cancel a mortgage without the party, whose right is thereby destroyed, has been heard. *ib*

8 The third possessor of property subject to several mortgagees, and who has purchased from his vender, a right to the first mortgage, when the property is sold by the sheriff, on the application of subsequent mortgagees, is entitled to be first paid out of the proceeds, although he become the purchaser himself.
Millaudon vs Allard et al. 547

9 A mortgage in favor of an absent person, executed and registered by the mortgager, although not accepted by the mortgagee, takes precedence of a posterior mortgage duly accepted and registered. *ib*

10 A mortgage cannot be shewn to exist by parole testimony: but the right to a mortgage resulting from a transfer of a claim to which a mortgage is attached, may be proved by parole evidence.
Moore's Administrator vs Loualliер, 571

11 The law requires a notary to make a memorandum at the foot of a note given for the payment of a sum secured by a mortgage; but it does not require him to certify the transfer of such note, or any one which is given on renewal of the original note. *ib*

12 The process verbal of sale of an estate made by the judge of probates, subscribed by the purchaser and his sureties, which stipulates or secures a mortgage on the property sold, is considered of record in the parish judges office, by being deposited and put on file in the office: it is thus deemed recorded according to the requirements of law. *ib*

NOTARIAL ACT.

A notarial act has no effect against third persons but from the date of its registry.
Williams vs Hagan and Co. 122

NOVATION.

1 If a creditor gives a receipt for a draft in payment of his account, the debt is novated. *Hunt vs Boyd*, 109

2 The debt is not novated when the vender consents that the person proposed as endorser may, if he chose, pay the price in cash. *Lalaurie vs Cahallen*, 401

NULLITY.

1 An action of nullity cannot be instituted in the district court to set aside and annul a judgment of the supreme court.
Melancton's heirs vs Broussard, 8

2 The district court cannot take jurisdiction and sustain an action of nullity to set aside one of its own judgments after it has been passed upon by the supreme court, whether it be affirmed or not. *ib*

3 Nullity does not result from the failure to annex copies of authentic acts to

PAGE.

a petition. *Smith's heirs vs Blunt*, 132

4 A judgment obtained by the fraudulent representations of the plaintiff's attorney, is void. *ib*

5 In such an action, the defendant is not driven to a distinct action, but may demand the nullity whenever it is sought to be enforced. *Paxton vs Cobb*, 137

6 A party who bought his own property at a sale on a *fi. fa.* and gave a twelve months' bond, has thus far executed the judgment as to debar himself from an action of nullity. *Fluker vs Lacy*, 265

OBLIGATIONS,

Joint and Several.

1 A promissory note, beginning "I promise to pay," etc., and signed by several persons, is several as well as joint in its application; and the parties may be sued jointly and severally, and judgment rendered *in solido*.

Bank of Louisiana vs Sterling, 60

2 In conditional obligations the law at the time the obligation was contracted, not that in force when the condition takes place, must govern the right of the parties. *Town vs Syndics of Morgan et al.* 112

3 A promise to pay out of the proceeds of the next crop, is a time given for the discharge of an engagement, and not a condition on which the fulfillment of the obligation depends. *Johnson vs Bell*, 258

4 *Solidarity* in obligations must be express, except in the case of commercial partners. *Bennett vs Allison*, 419

PARAPHERNAL PROPERTY.

1 The wife has the right, at any time, during marriage, to present her claim and recover the amount of her paraphernal property against her husband, and resume its administration

Gilbeau's Heirs vs Cor er, 6

PARISH JUDGE.

1 At a probate sale where property is struck off to the brother of the parish judge who makes the sale, the latter may take a conveyance, and receive a valid title to the thing sold, without being considered a purchaser at his own sale.

Scott vs Calvit et al 69

2 But admitting it to be proved that the brother of the parish judge bought the property expressly for the latter, the nullity occasioned thereby, would be only relative, and could be taken advantage of only by the heirs, or creditors of the succession sold. *ib*

PARTNERS.

1 The payment of partnership debts by a solvent partner, ought not to delay the payment to the syndic, of moneys which he was otherwise entitled to receive.

Warfield vs His Creditors, 189

2 On the insolvency of a partner, his syndic has a concurrent, but no exclusive right to the liquidation of the affairs. *ib*

3 A copartner has no interest in a note given to his partner not for the benefit of the firm, and which is not endorsed to him. *Terran vs Delastra*, 324

4 The sole intention of the legislature by the article 3128, was to dispense with the service of the act of pledge required by the preceeding article in case of paper not negotiable

Charbonnet vs Toledano, 386

5 Until the accounts of the partners are settled, one partner has no action against the other, and of course prescription does not run. *Bauduc's Syndic vs Lauret*, 449

PARTY IN INTEREST.

1 A party in interest may convey his legal title in a note to a third person, and by such conveyance, give that person a right to sue in his own name. In such a case, the defendant may offer every defence to the suit by the agent, which he could present against the action of the principal. The agent can only be considered as the nominal plaintiff.

Lacoste vs De Armas, 263

PRACTICE.

1 When a cause is remanded to ascertain a question of fact, on an appeal from a judgment, if on an examination of the evidence sent up with the new record, there appears no error, in the proceedings of the inferior judge, the judgment will be affirmed.—*Marck vs Church Wardens of St. Martinsville*, 4

2 In examining the evidence upon which the jury acted, if the court is unable to concur with the jury in opinion, it will, in accordance with its usual practice, remand the cause for a new trial, and the opinion of another jury.

Montgomery vs Russell, 67

3 If an appellant urge that the subject of the contract between the parties is illicit and the contract void, after having a-

PAGE,

vailed himself of its amount, to plead in reconvention and augment the sum in dispute to three hundred dollars and upwards, and be thereby entitled to appeal, such defence will be deemed as coming with an *ill grace* from the party using it, and be disregarded. *Rife vs Henson*, 96

4 In the progress of a suit on a note for the purchase money of a tract of land, the court will not delay the proceedings to grant an order of survey, to ascertain the supposed interference of other claims, and on the bare suggestion of the defendant that it is defficient in quantity, without any affidavit to that effect.

Faulk vs Wooldridge, 98

5 A plaintiff should not be delayed in the prosecution of his rights apparently just, by a bare suggestion of deficiency contained in the defendant's answer. *ib*

6 After a general denial, an amended answer, setting up a want of consideration to the note sued on, cannot be received. *Calvert* vs *Tunstall*, 207

7 If it appear from the pleadings or evidence, that both parties claim under the same title, neither will be permitted to attack it. *Trahan vs McManus* 209

8 It is not too late after the jury are sworn, to strike from the record documents irregularly filed. *Baines* v *Higgins*, 220

9 The court should charge the jury not to notice a supplemental petition irregularly filed; otherwise, if no objection be made to the introduction of evidence in support of its allegation. *ib*

10 A co-defendant, although he reside in a different parish, must answer in that where the suit is brought.

Flower vs *Hagan et al.* 223

11 Nothing prevents a suit being bro't for the surrender of a note not sued on. *ib*

12 Nothing can be assigned as error of law which could have been cured by evidence legally given at the trial. *ib*

13 The circumstance of the jury finding three hundred dollars damages, when only two hundred were claimed, furnishes no ground for setting aside their verdict; and for the excess, the attorney had a right to enter a *remititur*.

Mead v *Buckner*, 282

14 It cannot be considered an *incident in the cause*, after judgment is rendered against the defendant, to call in another party for the purpose of obtaining judgment against him: it is, on the contrary, the commencement of a new suit against the surety, growing out of the proceedings against the principal which have terminated in judgment and execution.

PAGE.

Gale vs *Quick's bail*, 348

15 In a suit for the rescision of a sale of property for want of authority in the agent to sell, and of *lesion* in the price, if no decision is made by the district court on the allegation of *lesion*, it will not be noticed in the supreme court.

Livingston vs *Coiron*, 441

12 The privilege conferred by the 249th article of the Louisiana Code, is an exception to the general rule, and cannot be extended beyond the case provided for

Goodloe vs Hart, 446

13 If a petition in intervention be answered on the merits, and the cause tried in relation to them, the right of the party to intervene cannot be questioned on appeal. *Herman vs Pfister*, 455

14 Holders of negociable instruments are not required to prove the consideration they gave for them, unless specially called on to do so, by that consideration being denied in the answer. *ib*

15 For the government of the judicial proceedings in the United States courts within the limits of Louisiana, its laws directing the mode of practice in the courts of the state, passed prior to the 26th of May, 1824, must be looked to as the legitimate rules of practice in those of the United States, and not those rules of practice which may have been subsequently introduced by the legislative power of the state.

Bradbury et al vs Morgan et al. 476

16 A suit to recover damages against intervenors or third persons in a former suit, and who obtained judgment and dismissed the plaintiffs attachment suit, is wholly untenable, while such judgment stands unreversed and unappealed from.

Adams vs Harrison, 587

PRESCRIPTION.

1 If the plea of prescription be pleaded in the Supreme Court, the party to whom it is opposed may demand that the cause be remanded for trial upon that plea—but if it appear that substantial justice has not been done, a new trial will be ordered.

Chew et al. vs *Keene* 120

2. By the laws of Spain prescription ran against a married woman during coverture, for her pharaphernal rights.

Benite vs *Alva*, 366

3 The prescription applicable to overseers does not apply to an agent employed in superintending the construction of a steam engine This action is barred by

PAGE.

the prescription of one year.
Nicholls vs *Hanse et al* 332

4 If a claim be barred by prescription, it still may be offered by way of exception. *ib*

5 The prescription of thirty years does not necessarily extinguish all debts.
Gravier vs Gravier, 457

PLEDGE.

1 When a firm contracts with certain individuals for a letter of credit, upon which it receives advances of 4200 dollars, and agrees at the same time to put notes and accounts into the hands of these individuals to indemnify them against loss, they will hold the notes, &c., thus pledged, against other creditors, although the firm is in failing circumstances, and the notes, &c., are not conveyed to the pledgees by authentic act, etc.
Edgar vs *Simons et al.* 19

2 Where negociable notes are delivered as security for a debt, and no authentic act is made to evidence the pledge, they will not confer a preference in case of insolvency. *Devlin* vs *His Creditors*, 360

3 The pawnee who has not taken written evidence by an authentic act or private instrument of the pawning, cannot avail himself of it against third persons.
Canezo's Syndic vs *Cuadra*, 495

PROMISSORY NOTE.

1 A promissory note made payable to order is transferable by endorsement, only to enable the endorsor or assignee, to endorse it over, or to resist the drawers claim for compensation of sums due him from the transferor, on account of payment made before transfer, or before the note became due.
Hughes vs Harrison et al. 89

2 But the holder or payee of a note even payable to order, may transfer all his interest in it without endorsing it, in like manner as in a cession of goods or consignment to trustees. *ib*

3 A mutual understanding or agreement between the obligor and obligee of a note, to have the contract for which it is given rescinded, and the note cancelled, will be considered binding, although omitted or neglected to be actually carried into effect; and a recovery on the note will be withheld. *Benson vs Smith*, 103

PROMULGATION.

PAGE.

An act of the legislature, the execution of which is suspended by one of its clauses, or by a delay of its promulgation, may, in the meanwhile, be modified or repealed by a posterior act.
Mayor vs Ripley, 344

QUASI OFFENCES.

An action for the repayment of money obtained under an unlawful agreement, is not debarred by the 3501st article of the Code in relation to *quasi* offences.
Perillait vs. Puech, 428

RECONVENTION.

1 It is not necessary to file an answer to a plea in reconvention.
Mead vs Buckner, 282

2 The principle that reconvention on reconvention cannot be permitted was firmly settled by our ancient laws, and the Code of Practice neither contemplates nor provides for such a mode of proceeding. But the party must object to its being filed at the time it is offered.
Mead vs Buckner, 282

3 Where a person enters upon vacant premises, if on being sued for the rent by the owner (who was unkown to him when he entered) he reconvenes for repairs, he will be considered not in the light of an usurper, but as possessing for the owner. *Paulding vs Dowell* 452

RECUSATION.

It is a good cause of recusation in a judge, that he is owner of a pew, when the plaintiff seeks to recover the ground on which the church is erected.
State vs Lewis, 389

REDHIBITION.

1 Proof of a slave having ran away once does not constitute a habit of running away. *Ails vs Bowman*, 250

2 A slaves misrepresention of his own name and that of his master when arrested, is not a sufficient circumstance to imply the habit of running away from a single instance. *Bocod vs Jacobs*, 408

3 Circumstances posterior to the sale may have some weight in proving the existence of a previous habit; but the mere fact of running away after the sale, added to a single instance before, does not establish an anterior habit. *ib*

4 The vender is not affected by the assertion of his broker that the slave is a good subject. Such a character is not ab-

PAGE.

solutely inconsistent with the circumstance of his having absented himself for a few days. *ib*

5 Questions relating to redhibitory vices and defects in things sold, must be solved principally in relation to the peculiar circumstances and facts of each individual case. *Beale vs De Gouy*, 468

6 Unless the object sold be absolutely useless, it is rather the duty of courts of justice to make a fair deduction from the price, than entirely to avoid the sale, especially when the real value of the thing, bears any reasonable proportion to the price agreed on. *ib*

RES JUDICATA.

1 There must be a plaintiff and defendant as well as judge, and an issue joined, to give a judgment the force of res judicata. *Marchand* vs *Gracie*, 147

2 The plea of res judicata is not sustained by a judgment of nonsuit. *Perrillait vs Puech*, 428

3 The judgment of homologation should cover the whole ground on which the minors claim is resisted, as well that of the release of the mortgage as the payment of the price received for the mortgaged premises, before it can have the effect of res judicata. *Dorfiules vs Duplesis*, 484

4 The decree of a foreign court of admiralty is res judicata in regard to the matters decided therein. *Zeno vs Insurance Company*, 533

5 An action cannot be sustained, to set aside a former judgment of the same court, unappealed from and unreversed: it forms res judicata betweeu the parties. *Andrews vs Harrison*, 587

SALE.

1 When a probate judge proceeds to a public sale of property under his own order of court, he assumes the character of an auctioneer, and as such, is not answerable for his conduct, except under ordinary proceedings established by law. *Winn vs Scott*, 88

2 Where A exchanges with B the negro Jack for Aaron, and takes a bill of sale from B, providing "that if he makes a satisfactory title to Aaron by a particular day, named in the obligation or bill of sale, in that event is to be void, otherwise to be in full force and virtue." The intent of such an obligation is that B conveys Jack to A by a title defeasible, on his executing a good title to Aaron. *Madry vs. Young*, 104

3 But in default of B's making a good title to Aaron, Jack is the property of A, in virtue of the bill of sale, who first exchanged him with B; on the aforesaid condition, A will hold Jack in despite of the vendee of B. *ib*

4 Where a price is agreed upon for an article which is neither weighed or delivered, and two days thereafter it be destroyed, it is not such a delay as to make the agent liable to the owner; nor is it incumbent upon the former to sue the buyer when the owner declines giving him authority for that purpose. *Lamoreau vs. Fowler*, 174

5 A creditor at whose suit the property is sold, cannot treat the conveyance as a nullity. If the alienation be in fraud of his rights, he ought to bring an action to set it aside. *Trahan* vs *McManus* 209

6 If A direct B to purchase a cargo, and draw for the amount on C, on the protest of the bills A is immediately liable for the amount of the cargo, although B produces not the protested bills. *Daniels as Burnhan*. 243

7 If a slave be bought as a runaway, and is afterwards employed on a steam boat without permission from the owner, from which he absconds, the owner can only recover the price paid for the slave.

8 If, owing to irregularities in the proceedings, a public sale be illegal, the purchaser must return the property, for he cannot hold it under a sale which is null and void. If, on the contrary, the sale be perfect, he must pay the price and cannot keep both the property and the price he was to pay for it. *Danois vs Leeds*, 355

9 When the last bidder does not comply with the terms of the sale, the law authorizes the property to be put up again for sale; but it does not *make it the duty of the vender to do so*, and leaves him at liberty to pursue all other legal remedies. *Lalaurie vs Cahallen* 401

10 It is discretionary with the court to grant to the vendee a delay to comply with the conditions of the sale. *ib*

11 The tradition and not the naked consent of parties, is necessary to transfer the dominion of property. But as an actual delivery of rights and credits or of incorporeal objects, cannot be made, the

PAGE.

transfer, to affect third persons, must be made by delivery of the title or evidence of the debt, and notice to the debtor. 422

12. It is a principal of the laws of this state, that the property of debtors is always held liable to their creditors until a full and complete transfer and tradition is made to the purchaser. *ib*

13 Whether a contract for the purchase of tobacco not inspected, can be enforced? Quere. *Lewis vs Clark*, 438

14 A written promise to sell or convey real property is valid, notwithstanding there is no signing or written assent by the promisee. Proof of that assent may be proved by evidence *aliunde*. *Joseph vs Moreno*, 460

15. The act of adjudication confers a complete title to the object or property sold on the purchaser, without any deed or act passed before a notary by the seller *Marigny et al. vs Nivet et al.* 498

16 And the purchaser who buys according to certain definite and fixed boundaries described in the act of adjudication, takes all the lands between such bounds, although it gives him a greater quantity than that called for in his title. *ib*

17 A purchaser who accepts a deed for a less quantity than what is contained in the act of adjudication, does not thereby lose the right he has acquired to a larger amount of property under the sale. *ib*

18 The acceptance of a deed under such circumstances, is in the nature of a contract entered into by the purchaser *in error* of the rights he already possessed, and as such, is not binding on him. *ib*

19 Where A obtains a letter of credit, but before it is presented the persons who gave it, losing confidence in A, direct him not to use it; but he afterwards presents and uses it, contrary to directions, by purchasing goods on the faith of it from B; such use is a fraud practiced on B, which authorizes him to claim the goods in preference to an attaching creditor of A.

Gasquet et al vs Johnson et al. 514

20. A fraudulent purchaser, who obtains property by a fraudulent representation, acquires only the naked possession, which gives no right to any of his creditors to attach it in his hands. *ib*

SLANDER.

PAGE.

1 Actions for slander and defamation may be sustained under our Civil Codes, without resorting to the civil laws of other countries, which are said to be repealed by our statute of 1828.

Carlin vs Stewart. 73

2 In actions of slander and defamation of character, the jury or court must often allow damages when no special damages is shewn to have been sustained. *ib*

3 Professional men are often unable to exhibit possitive proof of the injury done to their reputations by malicious persons and slanderers, and would be, in many cases, absolutely remediless, if a jury or a court are not allowed to find a guide in the dictates of their consciences. *ib*

4 On the score of quantum of damages the jury are the legitimate judges, and unless they clearly err, the verdict ought to stand. *ib*

6 In actions of slander and defamation of character, it is sufficient to sustain the action, to prove in substance, the words charged to have been spoken.

Trimble vs Moore, 577

7 In cases of this kind, slanderous words spoken, are not to be construed in a technical manner, but taken in their proper sense, and considered in relation to the idea they were intended and might convey to the bystanders, or company to whom they were addressed. *ib*

SLAVE.

PAGE.

1 The infliction of cruel punishment on the slave by his master, is a criminal offence which must be punished by a criminal prosecution, and not in a civil action. *Markham vs Close*, 581

2 Maiming, mutilating, or cruel or inhuman treatment of a slave, is a public offence, and must be prosecuted criminally, and after conviction, the fine and other penalties for such conduct, are to be levied on the offender by the court before whom the conviction takes place. *ib*

3 The Civil Code treats alone of private rights of individuals, and the various rights growing out of property; but it may, in the mean time, provide in what cases a breach of the penal laws brings with it a *forfeiture of private rights*. *ib*

SUBROGATION.

PAGE.

Where a builder contracts with the owner to build a house, and enters into a written agreement with third persons to slate it; the former acquires a privilege to which the latter, on certain event happening, may be subrogated.

Florence vs Mercier, 487

PAGE.

SURETIES.

1 Sureties who sign a sheriff's bond, thereby acknowledging him as sheriff *de facto*, cannot, for any informality or defect in his appointment, be permitted to *deny the capacity* of their principal thus recognized. *Police Jury vs Hawe et al.* 41

2 Indulgence given by not suing the principal, will not exonorate the sureties, unaccompanied by an express grant of time. *ib*

TABLEAU.

1 A party has a right to bring forward at any time before the filing of the tableau of distribution and its homoligation, all claims in virtue of which he has become creditor since the rendition of the judgment, on demands which existed previous thereto; and for this purpose, may file a supplemental petition.

Franklin vs Syndics of Warfield, 126

2 A creditor who has appeared in the concurso and successfully attempted to obtain a different place on the tableau, is bound by the final judgment, and cannot maintain an action of nullity.

Croft vs Kirkland's Syndic, 155

3 A creditor of an insolvent who files his opposition to the homologation of the tableau, cannot afterwards urge any irregularities against the proceedings, which might have been embraced in his first opposition. *Kirkland vs His creditors*, 205

4 The syndic of an insolvent cannot maintain an action after the filing and homologation of the tableau of distribution. *Beauvais vs Morgan*, 287

TAXES.

1 One notoriously acting as sheriff may rightfully be entrusted with the collection of the parish taxes, whether he be sheriff *de jure* or not, and his sureties are bound for the faithful performance of his trust. *Police Jury vs Hawe et al.* 40

2 The parish loses none of its rights against the sureties of its collecting officers, by not enjoining an execution of the state, issued against such officers, for arrearages of state taxes. *ib*

3 A purchaser of town lots in the city of New Orleans, from the United States, is exempt from taxation for five years after their alienation.

Mayor et al. vs Piquet, 474

THIRD PARTY.

If the plaintiffs claim through a deed made to the trustee, he is not a third party to them, in relation to any proceedings which may have taken place in respect to the property he held in that capacity. *Dismukes vs Musgrove*, 335

THIRD POSSESSOR.

The plaintiff must seek redress by personal action against the coheir or his representative, before he can attack the third possessor. *Chew vs McDermot*, 235

TRESPASSER.

1 Where slaves are hired out for a term which is unexpired, and in the mean time the owner sells them to another, if such purchaser take them from the person to whom they were hired before the term expires, he will be answerable in damages as a trespasser.

Grayson vs Wooldridge, 94

2 In an action of trespass, it is not necessary to state the trespass happened in any particular part of the parish; because had it been stated, evidence that the trespass was committed in some other place in the parish, would have been good, even in criminal cases. *ib*

3 The plaintiff who was no party to the deed of sale between Wooldridge and Bowden, was a competent witness to prove the declaration of Wooldridge's vender, to show Wooldridg's knowledge of the plaintiff's right to retain the negro on hire. *ib*

USURY.

1 The execution of a note upon which suit is founded being established, and its consideration shewn, the plea of usury set up against it, appearing unfounded, judgment for the amount of the note, interest and costs, will be affirmed.

Franklin vs Alexander, 76

2 An agreement made in New York to be executed there, must be governed by the laws of that state. If such contract is usurious and void by the laws of that state, it will be considered so here; because this court must decide the cause here as it would be decided there The statute of the state of New York prohibits taking more than seven per centum for the loan of money, and by the terms of the statute, the prohibition is extended to wares, merchandise, or any thing else. *Clague et al vs Their Creditors*, 114

3 If in the exchange of notes between A and B, more than seven per cent. per

PAGE.

annum as interest be taken, the contract is tainted with usury, and void, according to the decisions of the courts of New York on that statute. *ib*

4 Those courts have established the maxim, that by no shift or device can more interest be taken, or profit made, than that which the law permits on the loan of money. *ib*

5 When A agrees with B to exchange their respective notes, bearing interest at the rate of six per cent. per annum, and in consideration thereof, to insure with B the lives of different individuals, and to consign his sugar crop in Louisiana to B, for sale in New York, on commission, this agreement is null and void under the aforesaid statute of New York against usury. *ib*

6 A contract by which usurious interest is exacted and paid, is in compliance with a natural obligation and cannot be recovered back. Such a contract is not *malum in se* but *malum prohibitum*.

Perillait vs Puech, 428

VERDICT.

1 A plaintiff may release a part of the verdict even before judgment is pronounced upon it, to avoid a motion for a new trial. "Every man may renounce his rights or any part of them."

Pargoud vs Morgan, 100

2 If a jury be permitted, in the absence of the defendant and without any application from the plaintiff, to reconsider their verdict and bring in another, the second will be set aside and the cause remanded for further proceedings in the state it was when the jury requested permission to amend it. *Abat vs Holmes* 118

3 The court cannot add interest to the verdict. *Mullony vs McDougal*, 157

5 In complicated transactions of several years standing, it is difficult to ascertain on what grounds the jury found their verdict, and in such cases, it will not be disturbed.

Eauduc's Syndic vs Laurent, 449

5 In a suit on a note twentyfour years after it becomes due if the testimony does not conclusively establish payment, but presents circumstances to induce the jury to infer that fact, their verdict will not be disturbed. *Petayvin vs Maurin*, 480

PAGE.

6 The verdict of the jury will be set aside if contrary to the evidence of the case. *Rousseau vs Chase*, 496

7 In a case involving accounts of forty years standing, the verdict of a jury has less weight than in other cases, because it requires operations not easily performed in a court or jury room.

Baudin vs Conway, 512

Via Executiva and Juicio Ordinario.

1 The affidavit required when the mortgagee proceeds by the *via executiva* against a third possessor, is not required in the *juicio ordinario*.

Smith vs Blunt, 132

2 Both remedies cannot be pursued at the same time, and after the *juicio executivo* is turned into the *juicio ordinario*, the former cannot be again resorted to.

De Gruy vs Hennen, 544

WALLS.

Walls erected by a proprietor on his property which still leave a space between them and his neighbors, cannot be considered as surrounding the premises. They are not division walls, and it is only these which authorizes one coproprietor to refuse permission to another to raise a separation between them on the land of both. *Crocker vs Blanc*, 581

WARRANTY.

1 To support an allegation of breach of warranty, a judicial sentence is not indispensable; but to supply the want of it, other evidence must prove that the acts were illegal, and that forfeiture followed them, or would have followed them.

Thompson vs In. Co. 228

2 A warranty against illicit trade is forfeited only by the vessel being engaged in an illicit trade, which renders her liable to seizure. If the illicit trade be not the ground, but only the pretext, there is no breach of warranty. *ib*

3 Where a party resorts to his action of warrantry, before a decision of a court of justice is made against him, he assumes and takes upon himself the burthen of proving that the land belongs to another. *Kemp vs Kemp*, 240